

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

**BRIEF FOR APPELLANTS
AND JOINT APPENDIX**

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,987

886

HILTON HOTELS CORPORATION, ALLEGHENY HOTEL
CORPORATION, SHERATON MID-CONTINENT CORPORATION,
Appellants,

v.

ROBERT C. WEAVER, Administrator of the Housing and
Home Finance Agency, *Appellee.*

On Appeal from the United States District Court for the
District of Columbia

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United States Court of Appeals
for the District of Columbia Circuit

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

QUESTIONS PRESENTED

1. Is Section 106(g) of the Housing Act, adopted in 1959, applicable to require a survey of need prior to the proposed construction of an eight story hotel, even though an urban renewal plan approved prior to the statute incidentally listed "Hotel" among several two story structures that might possibly be built?

2. When Congress added Section 106(g) to the Housing Act of 1949 requiring urban renewal agencies to secure a competent, independent analysis of the local supply of transient housing, did Congress intend thereby to prohibit the construction of hotels in all urban renewal areas in the absence of a proven need?

3. Does a Contract for Loan and Grant between the Housing and Home Finance Agency and a local urban renewal agency immunize the local agency from subsequent federal regulation pursuant to statutory amendments of the Housing Act?

4. Did Congress add §106(g) to the Housing Act of 1949 for the protection of appellants and other hotels so that appellee's failure to enforce §106(g) constitutes a "legal wrong" and establishes appellants' standing to sue under §10(a) of the Administrative Procedure Act?

5. Is the appellee insulated from judicial inquiry into his disregard of a mandate from Congress because the Housing Act does not expressly provide a procedure for judicial review?

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ROBERT C. WEAVER, Administrator of the Housing and
Home Finance Agency, *Appellee.*

On Appeal from the United States District Court for the
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BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the district court which dismissed appellants' complaint on the ground that "the court lacks jurisdiction over the subject matter in that plaintiffs lack standing to sue."

Jurisdiction of the cause below was based upon 28 U.S.C. § 1331; Section 10 of the Administrative Procedure Act,

60 Stat. 243, 5 U.S.C. § 1009; and Section 106(c)(1) of the Housing Act of 1949, 63 Stat. 418 (1949), 42 U.S.C. § 1456(c)(1). An actual controversy between appellants and appellee was alleged wherein the matter in controversy exceeds the sum or value of \$10,000.

The complaint alleged that appellants, three hotel corporations doing business in Pittsburgh, Pennsylvania, will be gravely injured by the arbitrary and unlawful action of appellee, the Administrator of the Housing and Home Finance Agency, in approving the construction of a hotel to be built in a Pittsburgh urban renewal area wherein no proof has been presented of the need for additional hotel rooms in the locality, as required by § 106(g) of the Housing Act of 1949, 73 Stat. 674 (1959), 42 U.S.C. § 1456(g) (Supp. IV, 1963).

Jurisdiction of this Court is founded on 28 U.S.C. §§ 1291, 1294.

STATUTES INVOLVED

Housing Act of 1949, as amended, Section 106(g), Act of September 23, 1959, 73 Stat. 674, U.S.C. Title 42 (Supp. IV, 1963), § 1456(g):

“(g) No provision permitting the new construction of hotels or other housing for transient use in the redevelopment of any urban renewal area under this title shall be included in the urban renewal plan unless the community in which the project is located, under regulations prescribed by the Administrator, has caused to be made a competent independent analysis of the local supply of transient housing and as a result thereof has determined that there exists in the area a need for additional units of such housing.”

Administrative Procedure Act, Section 10(a), Act of June 11, 1946, c. 324, § 10, 60 Stat. 243, U.S.C. Title 5, § 1009(a):

“Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.”

STATEMENT OF POINTS

1. The district court erred in dismissing appellants' complaint on the ground that the court lacked jurisdiction of the subject matter "in that" appellants lacked standing to sue.
2. The district court erred in failing to hold that the complaint stated a cause of action and that appellants had standing to sue.
3. The district court erred in failing to hold that § 106(g) of the Housing Act of 1949, 42 U.S.C. § 1456(g) (Supp. IV, 1963), requires that an independent agency analyze the local supply of transient housing and indicate a need for additional hotel rooms before a hotel may be constructed in an urban renewal area under the situation presented by the allegations of the complaint.
4. The district court erred in failing to hold that the incidental inclusion of a reference to a possible hotel in a 1955 urban renewal plan does not authorize proceeding with construction of the hotel now proposed without a prior survey of need, when construction was not negotiated until more than a year after the passage of § 106(g) in 1959, and no construction has yet begun.
5. The district court erred in failing to hold that appellee's violation of § 106(g) will cause appellants such injury as establishes appellants' standing to sue under § 10(a) of the Administrative Procedure Act, 5 U.S.C. § 1009(a).
6. The district court erred in failing to hold that the complaint stated a cause of action in alleging that the approval previously granted by appellee for construction of a proposed hotel in the Pittsburgh urban renewal area was illegal, if, as alleged, there is an oversupply of hotel rooms in the area.

STATEMENT OF THE CASE

This is a suit by three hotel corporations to enjoin the Administrator of the Housing and Home Finance Agency from continuing his approval of the Government-subsidized construction of a hotel in a Pittsburgh urban renewal area on the grounds that the procedure required by statute has not been followed, and that Appellants will be seriously and irreparably injured by the illegal action.

1. Appellants are corporations owning and operating hotels in Pittsburgh, Pennsylvania. Hilton Hotels Corporation owns and operates the Pittsburgh Hilton Hotel; Allegheny Hotel Corporation owns and operates the Pick-Roosevelt Hotel; Sheraton Mid-Continent Corporation owns and operates the Penn-Sheraton Hotel.

2. Appellee, Robert C. Weaver, is the Administrator of the Housing and Home Finance Agency, a governmental agency, deriving his powers as far as here concerned, from Reorganization Plan No. 3 of 1947, 61 Stat. 954, 955 (1947) and Section 106 of the Housing Act of 1949, 63 Stat. 413, 417, as amended, 42 U.S.C. § 1456.

3. This case arises under Title I of the Housing Act of 1949, as amended, 63 Stat. 413 (1949), as amended, 42 U.S.C. § 1450 *et seq.*, the principal statute authorizing federal assistance to slum clearance and urban renewal. This Act provides for federal grants of two-thirds of the net cost of an urban renewal project, net cost being essentially the difference between the cost of acquiring and clearing the property and the price received on sale of the land for redevelopment, 63 Stat. 421, as amended, 42 U.S.C. § 1460(f). Originally the Act was limited to grants for the clearance of slums. In recent years, it has been broadened to permit grants for the conservation of deteriorating but not yet slum areas, 68 Stat. 626 (1954), as amended, 42 U.S.C. § 1460, and to permit renewal of large blighted areas in stages rather than in a single project, 70 Stat. 1099 (1956), as amended, 42 U.S.C. § 1452(d). The primary purpose of the Housing Act is, and has always been, "the

elimination of substandard and other inadequate housing" and the realization "of the goal of a decent home and a suitable living environment for every American family," 63 Stat. 413 (1949), as amended, 42 U.S.C. § 1441. Some commercial construction is permitted in renewal areas where it is needed to promote the entire project, but the Act dictates that: "Financial assistance shall not be extended . . . with respect to any urban renewal area which is not predominantly residential in character and which . . . is not to be redeveloped for predominantly residential uses," 70 Stat. 1097 (1956), as amended, 42 U.S.C. § 1460(c).

4. In practice, the local urban renewal project proceeds in three stages: (a) the development of a "workable program," (b) the design of an "urban renewal plan" as part of the application for and execution of a contract for loan and grant of federal funds, and (c) land clearance and disposition.

(a) The "workable program" is a plan of action for meeting the problems of community development generally, dealing with such things as building codes and ordinances, analyses of blighted neighborhoods, relocation assistance for displaced persons and the establishment of civic participation in an appropriate local administrative organization. Federal funds for surveys and planning are advanced when the workable program is approved.

(b) The urban renewal plan, 68 Stat. 626 (1954), as amended, 42 U.S.C. § 1460(b), is a generalized statement of goals as they exist from time to time for the reconstruction of a particular renewal area, consistent with the workable program, 63 Stat. 420 (1949), as amended, 42 U.S.C. § 1460(b). It includes a concise description of the project area, brief proposals for acquisition clearance and relocation, as well as some indication of proposed land uses by text and accompanying maps.¹ This plan is part of the application for a loan and grant contract which is the

¹ HHFA, Urban Renewal Administration, Urban Renewal Manual, Policies and Requirements for Local Public Agencies pt. 10. ch. 3, § 2 (1960).

means whereby the bulk of federal funds are paid over to the communities. An urban renewal plan is subject to modification and because of the period of years that usually intervenes between planning and completion of a project it frequently happens that the urban renewal plan is modified long after it was approved.

(c) Execution of the program finally requires the acquisition and clearance of the land and the disposition of the land for redevelopment. Contracts for land disposition must be approved by the HHFA and contain requirements which insure that the urban renewal plan is followed.

5. In June, 1955, the Pittsburgh City Planning Commission prepared an urban renewal plan—then known as a Redevelopment Area Plan²—for the redevelopment of part of the Lower Hill District of the City of Pittsburgh. This area, comprising about 46 city blocks, adjoins the central business district of the city, where appellants' hotels are located. The plan consisted of a map and accompanying text:³

² This plan will hereafter be referred to as the "urban renewal plan" or the "renewal plan." To avoid confusion it should be noted that § 110 of the Housing Act of 1949, 63 Stat. 420 (1949), originally provided for a "Redevelopment Plan." This section was subsequently amended by § 311 of the Housing Act of 1954 to provide for an "Urban Renewal Plan" 68 Stat. 626 (1954), as amended, 42 U.S.C. § 1460(b). The differences between the definitions of "Redevelopment Plan" and "Urban Renewal Plan" are not significant for present purposes and the phrase "Urban Renewal Plan" conforms to present usage under the Act.

³ The plan, a public document, while not part of the record in this case, was part of the record in *Pittsburgh Hotels Association, Inc. v. Urban Redevelopment Authority of Pittsburgh*, 309 F. 2d 186 (3d Cir. 1962), cert. denied, 372 U.S. 916 (1963). Inasmuch as this case centrally involves the plan, appellants intended to submit a copy to the Court as an exhibit. Appellants attempted to obtain copies of the plan, from counsel for the appellee and counsel for the Urban Redevelopment Authority of Pittsburgh, but were unsuccessful. Under the circumstances, appellants will quote herein from parts of the plan reproduced in the appendices submitted to the Third Circuit, and request this Court to take judicial notice of such statements. For that purpose a copy of the appendices filed in the Third Circuit will be lodged with the clerk of this court. If a trial is had, appellants will offer a complete copy of the plan in evidence.

(a) The map showed the boundary lines of the project and proposed and existing cross streets. Parts of the map were cross-hatched in different designs to indicate, according to a key, "parking," "residential," "cultural, recreational, education," and "commercial" areas. One area of several acres, bore the "commercial" design and was bisected by a 60-foot wide thoroughfare named Chatham Street.

(b) In the text of the plan accompanying the maps the land use labeled "commercial" was defined as follows:

"(a) The permitted land uses and buildings shall be the following:

- Automobile sales agency
- Art and antique shop
- Business College or Private School
- Financial Institution
- Hotel
- Interior decorating shop
- Library
- Museum
- Music conservatory or studio
- Office, business or professional
- Radio or television broadcasting station
(without tower)
- Restaurant
- Studio, artist
- Theater or Cinema
- Wholesale merchandise establishment or brokerage and accessory uses and buildings for any of the foregoing."

The inclusion of the word "Hotel" in this list, between "Financial Institution" and "Interior decorating shop" was the *only* reference to hotels in the entire plan.

(c) At the precise spot where it is now proposed to build an eight story hotel, the plan expressly limited the

⁴ Urban Renewal Plan, Part F-2-b(2)(a), reproduced in Appendix For Appellees, pp. 8b-10b *Pittsburgh Hotels Association, Inc. v. Urban Redevelopment Authority of Pittsburgh*, 309 F. 2d 186 (3d Cir. 1962), *cert. denied*, 372 U.S. 916 (1963).

height of any building to be constructed to "two stories or twenty feet,"⁵ and described a 60-foot wide thoroughfare known as Chatham Street.

(d) Section J of the renewal plan expressly made it a condition of the plan that it could be modified "at any time" upon approval of the city, the planning commission and the redevelopment authorities.

6. The renewal plan was approved by the Urban Redevelopment Authority of Pittsburgh (hereafter referred to as the "Authority") and submitted to the Housing and Home Finance Agency as part of an Application for Loan and Grant Contract. In October, 1955, a Loan and Grant Contract was entered into between the Authority and HHFA. The contract approved the renewal plan and expressly contemplated that changes in the plan would be made from time to time. (J.A. p. A5)

7. On September 23, 1959 § 106(g) was added to the Housing Act. This section is as follows:

"(g) No provision permitting the new construction of hotels or other housing for transient use in the redevelopment of any urban renewal area under this title shall be included in the urban renewal plan unless the community in which the project is located, under regulations prescribed by the Administrator, has caused to be made a competent independent analysis of the local supply of transient housing and as a result thereof has determined that there exists in the area a need for additional units of such housing."

8. At no time prior to the addition of § 106(g) to the Housing Act had any negotiations, planning, financing commitments, agreements or options to construct a hotel on any of the properties within the renewal plan been undertaken by the Authority. (J.A. p. A5).

9. The renewal plan was modified by Modification No. 1 on March 4, 1957, reducing the width of Chatham Street from 60 to 44 feet, and by Modification No. 2 on September

⁵ Urban Renewal Plan, Part F-2-6(2)(d), p. 15, note 4, *supra*.

27, 1960, which, *inter alia*, entirely removed Chatham Street from the site of the now proposed hotel. The modification of the plan removing Chatham Street did not take place *until more than a year after the enactment of § 106 (g)*. *The two story height restriction on all buildings at the site of the now proposed hotel has not yet been modified or removed.* (J.A. p. A5).

10. At no time did appellee direct the Authority to make an analysis of the need or lack of need for new hotels in the area as required by § 106(g) of the Housing Act, 42 U.S.C. § 1456(g) (Supp. IV, 1963). No such analysis was ever made. It was alleged in the complaint, and admitted for present purposes, that if such analysis had been made it would have shown that at all times there has existed a surplus of hotel rooms in Pittsburgh. (J.A. p. A7).

11. In November, 1960, more than a year after the enactment of § 106(g), two private developers (Joseph S. Wohl and Leon Falk, Jr.) on behalf of themselves and the Golden Triangle Motor Hotel Corporation (subsequently organized by them) made an offer to the Authority for a six month option to enter into a 99-year lease for the purpose of redeveloping part of the redevelopment area with an eight story motor hotel. Under the offer, the hotel will derive important competitive advantages because no money is to be paid until two years after the exercise of the option. The corporation is to have free use of the land for the first two years. Thereafter, a stated rent is to be paid, with the corporation having the right to purchase the parcel at a stated price at any time during the 99-year term of the lease. (J.A. p. A6).

12. The Authority accepted the offer in December, 1960, and in June, 1961, a Contract for Disposition was signed by the Authority and the Golden Triangle Motor Hotel Corporation granting the corporation the six month option it requested. (J.A. p. A6).

13. Notwithstanding that the Authority had failed to make any analysis of the need for new hotels in the area,

on November 20, 1961, HHFA approved the Contract for Disposition between the Authority and the corporation. (J.A. p. A7).

14. No construction whatsoever has yet begun on the proposed hotel.

15. Appellants, and other corporations owning hotels in Pittsburgh brought suit against the Authority, the City of Pittsburgh, the Golden Triangle Motor Hotel Corporation and the two private developers to enjoin the unlawful construction of the proposed hotel. The United States Court of Appeals for the Third Circuit affirmed the District Court's dismissal of the complaint on the grounds that appellants lacked standing to maintain the suit. *Pittsburgh Hotels Association, Inc. v. Urban Redevelopment Authority of Pittsburgh*, 309 F. 2d 186 (3d Cir. 1962), *cert. denied*, 372 U.S. 916 (1963). Appellee was not subject to service of process in that suit and was not a party therein.⁶ Appellants respectfully maintain that the decision of the Third Circuit was erroneous. Further, because of the different parties and different relief requested in the two suits, this Court is not bound by the Third Circuit decision, but may and should declare appellee's authorization of the construction of the proposed hotel to be unlawful.

16. As a direct result of appellee unlawfully approving the disposition of redevelopment land for the construction of an unneeded hotel, appellants will face unlawful competition and will admittedly suffer serious and irreparable injury.

17. Appellants seek an order directing appellee to withdraw HHFA approval of the Contract for Disposition until a competent independent analysis is conducted and a determination is made in accordance with the statute that there is a need for additional hotels in the area.

⁶ Defendant was, of course, apprised of the suit and could have appeared in it, but did not do so, although repeatedly requested to do so by the plaintiffs in that case.

SUMMARY OF ARGUMENT

I

A. Section 106(g) of the Housing Act, 42 U.S.C. § 1456(g) (Supp. IV, 1963), requires a survey to be made demonstrating a need for new hotels may be constructed in an urban renewal area subsidized with federal funds. Such a survey has not been made of the Pittsburgh area, and if made it would admittedly demonstrate a surplus of hotel rooms. Nevertheless, the United States Court of Appeals for the Third Circuit decided that while "it might be wise to employ the safeguard" of § 106(g) in the Pittsburgh renewal area, the statute was inapplicable because the Pittsburgh urban renewal plan was not within the literal terms of the statute, in that prior to the enactment of § 106(g) the plan contained a provision which might have permitted some hotel construction. (*Pittsburgh Hotels Association, Inc. v. Urban Redevelopment Authority of Pittsburgh*, 309 F. 2d at 190). That decision was in error, and this Court is not bound to follow it.

The Pittsburgh plan as it existed prior to the enactment of § 106(g) in 1959 used the word "Hotel" but once, and then only incidentally in a list of 15 possible uses of certain commercially zoned land. Furthermore, all construction was limited by the plan to "two stories or twenty feet" and prohibited in a proposed street area described as Chatham Street. Nothing in the plan would have permitted the construction of the eight story hotel now proposed for the middle of Chatham Street.

There has been no reliance on the original plan. It is unquestioned that no negotiations for construction of any hotel took place prior to 1959, and that no construction of the proposed hotel has yet begun, now four years after the enactment of § 106(g).

Under these circumstances to inflate the incidental inclusion of the single word "Hotel" in the 1955 Pittsburgh plan into a "provision permitting the new construction of

hotels" referred to in the statute exalts a technicality and subverts the intent of Congress to require that a survey be made demonstrating a need for additional hotels prior to the subsidized construction of hotels in urban renewal areas.

B. The general purposes of the Housing Act and the legislative history of Section 106(g) clearly indicate that Congress intended by § 106(g) to prohibit the subsidized construction of surplus hotels. It was because the Third Circuit had not been presented with "reliable indicia showing a Congressional intent" to this effect that it refused to follow what it acknowledged as the "wise" course. But such reliable indicia are presented here in abundance.

1. The general policy of all the housing acts is to promote the construction of permanent residences, not hotels. For example, Title I of the Housing Act of 1949, under which this case arises, prohibits "financial assistance with respect to any urban renewal area which is not predominantly residential in character and which is not to be redeveloped for predominantly residential uses." 70 Stat. 1097 (1956), as amended, 42 U.S.C. § 1460(c). Section 106(g) was intended to implement precisely this policy by restricting construction of hotels in federally subsidized urban renewal projects to areas of proven need.

2. That hotel *construction* was the target of the legislation is unmistakably revealed by the comments of those most responsible for the legislation:

(1) Congressman Albert Rains, Chairman of the Subcommittee on Housing of the House of Representatives submitted § 106(g) as a floor amendment,* stating that it would require:

* The provisions which now appear as § 106(g) were inserted into the first housing bill considered by Congress in 1959 and were carried along with only minor modification in every subsequent proposed bill until enacted. The comments printed herein are thus references to sections in various proposed bills all of which are identical to § 106(g) as enacted. See pages 23, 24, *infra*.

"a survey to be made before a new hotel could be built in an urban renewal area."**

(2) The Senate Conference Committee in accepting § 106(g), reported that it would:

"prohibit hotels and other transient housing from being *constructed* in an urban renewal area unless the community obtains a competent independent analysis of the local supply of such housing and determines that there is a need for such housing."***

(3) Even the Housing and Home Finance Agency, in a contemporaneous construction of § 106(g) as it appeared in various bills then under consideration, stated that it:

"Prohibits *construction* of hotels and transient housing without certain prior analysis."†

(4) Both the Senate and House committee reports stated that the purpose of the survey provision was to:

"Prohibit hotels and other transient housing from being *constructed* in an urban renewal area unless the community obtains a competent independent analysis of local supply of such housing and determines that there is a need for such housing."††

The unambiguous legislative history of § 106(g) proves beyond question that Congress intended to amplify the long standing policy of the housing acts by preventing *construction* of hotels in all federally subsidized urban

** 105 Cong. Rec. 8815 (May 21, 1959). Emphasis added throughout brief unless otherwise stated.

*** Sen. Rep., Section-by-Section Summary of the Provisions of S. 57 as Agreed to in Conference, Committee Print, Senate Committee on Banking and Currency, 86th Cong., 1st Sess., 11 (1959).

† "Housing and Home Finance Agency. Comments on Numbered Items in Agenda of Senate Committee on Banking and Currency Relating to Housing Act of 1959 (S. 57, S. 612, S. 2378, 86th Congress)." IV-3 (July 23, 1959).

†† Sen. Rep. No. 715, 86th Cong., 1st Sess., 20 (1959); H.R. Rep. No. 1040, 86th Cong., 1st Sess., 18 (1959).

renewal areas, unless a survey of the area specifically indicated a need for additional hotels. The act was intended to apply prospectively, but immediately, and to require such a survey as a precondition to all future hotel construction. It is remedial legislation entitled to liberal construction to carry out the Congressional purpose. When, as in the instant case, there has been no reliance on the plan as it existed prior to 1959, when negotiations to build the now proposed hotel were commenced more than a year after § 106(g) was enacted, and when construction has not begun, four years after the amendment of the Act, the simple requirements of § 106(g) must be followed.

C. That in the instant case a Loan and Grant Contract was entered by HHFA and the Pittsburgh Urban Renewal Authority prior to the addition of § 106(g) to the Housing Act does not exonerate the appellee of his failure to enforce the amendment. In a case similarly involving the Housing Act the Supreme Court decided that Congress may impose on an existing contract obligating federal funds the additional requirement that the subject property not be used as a hotel. *F.H.A. v. The Darlington, Inc.*, 358 U.S. 84 (1958). That case is controlling here.

II.

A. The District Court dismissed the complaint for lack of "jurisdiction over the subject matter in that plaintiffs lack standing to sue." (J.A. p. A17). This decision was in error.

By approving the construction of the proposed hotel in the Pittsburgh urban renewal area without requiring a prior showing of need, appellee has violated the Housing Act and breached his duty to appellants to enforce compliance with § 106(g). As a result, appellants will suffer such injury as establishes their standing to maintain this suit as persons suffering "legal wrong" under § 10(a) of the Administrative Procedure Act, 5 U.S.C. § 1009(a).

The legislative history of § 106(g) clearly indicates that appellants are members "of a class for whose especial benefit the statute was enacted." (*Texas and Pacific Ry. Co. v. Rigsby*, 241 U.S. 33 at 39 (1916)). Congress in direct response to petitions of the hotel industry, passed § 106(g) to protect hotels from the very form of unfair competition now facing appellants—the competition caused by the subsidized construction of hotels in an area where they are not needed. It is appellee's duty to prevent such unfair competition by enforcing the survey requirements of § 106(g). But appellee has breached that duty with the result that appellants will suffer concrete, substantial and irreparable injury.

Under just such circumstances as these both the Supreme Court and this Court have recognized that a right of review exists. For the Supreme Court has stated that grounds for judicial review exist when a "disregard of the command of the statute . . . results in damage to one of the class for whose especial benefit the statute was passed." (*Texas and Pacific Ry. Co. v. Rigsby*, *supra*, 241 U.S. at 39). To the same effect see *Fleming v. Moberly Milk Products Co.*, 82 App. D.C. 16 at 21, 160 F. 2d 259 at 264 (D.C. Cir. 1947).

It follows that appellants do have standing to sue and the District Court was in error in dismissing appellants' complaint.

B. If appellants cannot pursue enforcement of § 106(g) then that section will not be enforced at all. HHFA has consistently opposed the section and has effectively refused to administer it by interpreting it in a manner so restrictive as to deprive it of any useful meaning. If the decision below is permitted to stand appellee will have obtained in practical effect the very repeal it has vainly sought from Congress. Such a result would be contrary to the accepted practices of statutory construction, *Texas & N.O.R.*

Co. v. Brotherhood of Ry. & S. S. Clerks, 281 U.S. 548 at 569 (1930).

By Section 106(g) Congress intended to create real benefits for existing hotels. While the Housing Act provides no statutory procedure for judicial review, it cannot be that Congress created a mere illusory right for appellants which would fail for lack of a means to enforce it. Cf. *Laughlin v. Riddle Aviation Co.*, 205 F. 2d 948 at 949 (5th Cir. 1953).

ARGUMENT

I. SECTION 106(g) OF THE HOUSING ACT APPLIES TO THE CONSTRUCTION OF THE PROPOSED HOTEL. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT TO THE CONTRARY IS ERRONEOUS.

A. The Incidental Inclusion of the Word "Hotel" in the Pittsburgh Urban Renewal Plan Prior to the Enactment of Section 106(g) Did Not Permit the Construction of the Hotel Now Proposed. Therefore, the Requirements of Section 106(g) Must Be Followed.

Section 106(g) of the Housing Act, 42 U.S.C. § 1456(g) (Supp. IV, 1963), requires a survey to be made demonstrating a need for additional hotels before a hotel may be constructed in any urban renewal area subsidized with Federal funds. Since such a survey has not been made in the instant case, and if made would admittedly demonstrate a surplus of hotel rooms, (J.A. p. A7) Appellee's continued approval of the construction of the proposed hotel is unlawful.

The United States Court of Appeals for the Third Circuit determined that § 106(g) did not apply to urban renewal plans adopted before 1959, when the Housing Act was amended by § 106(g), where the plan previously approved contained authorization to build a hotel. The Court held the Pittsburgh plan not to be subject to the restrictions of § 106(g), because it found that the 1955 Pittsburgh plan approved prior to § 106(g) had envisioned

that some hotel might be built. *Pittsburgh Hotels Association, Inc. v. Urban Redevelopment Authority of Pittsburgh*, 309 F. 2d 186 (3d Cir. 1962), *cert. denied*, 372 U.S. 916 (1963).

This holding was in error, for the provisions permitting the construction of the hotel *now proposed* were not included in the plan prior to 1959. As noted above (p. 7), the original 1955 plan contained the word "Hotel" only at one place, and then it was only in an indeterminate list of 15 possible *one or two story* structures that might be built in an area near Chatham Street. One searches the original plan in vain for any provisions permitting the construction of an eight story hotel in the middle of Chatham Street, the building and site now proposed.

As approved in 1955, the original Pittsburgh plan was no more than a generalized statement of goals, a kind of grand design for the area. It was not a detailed blueprint that would give anyone notice that a large hotel was to be built on a specific site. It consisted of maps showing the boundary lines of the project and proposed and existing cross streets. Parts of one map were crosshatched in different designs to indicate, according to a key, "parking," "residential," "cultural, recreational, educational," and "commercial" areas. One area of several acres, bore the "commercial" design and was bisected by a 60-foot thoroughfare named Chatham Street.

In the text of the plan accompanying this map the land use labeled "commercial" was defined as follows:

"(a) The permitted land uses and buildings shall be the following:

- Automobile sales agency
- Art and antique shop
- Business College or Private School
- Financial Institution
- Hotel
- Interior decorating shop

Library
 Museum
 Music conservatory or studio
 Office, business or professional
 Radio or television broadcasting station
 (without tower)
 Restaurant
 Studio, artist
 Theater or Cinema

Wholesale merchandise establishment or brokerage and accessory uses and buildings for any of the foregoing."⁷

The inclusion of the word "Hotel" in this list, between "Financial Institution" and "Interior decorating shop" was the only reference to hotels in the entire plan. Furthermore, at the precise spot where it is now proposed to build an eight story hotel, the plan described a 60-foot wide street and expressly limited the height of any building to "two stories or twenty feet."⁸ Clearly the two story zoning restriction rendered construction of a hotel an unlikely possibility, as compared to say an "Art and antique shop" or an "Interior decorating shop."

If prior to 1959, the developers of the proposed hotel had begun construction relying on that original plan, or even if the developers were now making proposals in accordance with the restrictions in the original plan, i.e., a two story hotel on a site *other* than Chatham Street, perhaps some grounds might be held to exist for dispensing with the required survey.

But we are not here concerned with a situation where construction is proposed of any hotel that might have been built under the plan as it existed prior to the enactment of § 106(g). For absolutely nothing in the plan prior to 1959 could conceivably have permitted the construction of an

⁷ See Urban Renewal Plan, Part F-2-b(2)(a), note 4, *supra*.

⁸ See Urban Renewal Plan, Part F-2-6(2)(d), p. 15, note 4, *supra*.

eight story hotel right in the middle of Chatham Street. It is only the removal of Chatham Street, and the avoidance of the two story height restriction, after 1959, that permit such construction, if indeed the plan permits such construction at all.⁹ Prior to these modifications, and perhaps still, the plan prohibited the construction of any building such as the proposed hotel.

It is unquestioned that at no time prior to the enactment of § 106(g) had any negotiations, planning or options to construct a hotel on any of the properties within the renewal plan been undertaken by the Authority. It is also the fact that no construction has yet begun on the proposed hotel—four years after the enactment of § 106(g).

Under these circumstances, the Third Circuit decision is plainly wrong, and this Court is not bound to follow it.¹⁰ To inflate the incidental listing in 1955 of "Hotel" among 15 possible uses of restrictively zoned property into a

⁹ Modification No. 2 on September 27, 1960 removed Chatham Street from the urban renewal plan, but appellants believe that no such modification was ever made removing the two-story building height restriction at the site of the proposed hotel. It appears that the two story restriction remains and that the construction of an eight story hotel will unlawfully violate the restriction. Proof of this fact would have been submitted had the District Court permitted a trial.

¹⁰ Appellee is the only one with the duty of enforcing § 106(g), but he was not subject to service of process and though apprised of the suit and requested to join voluntarily neither appellee nor any representative for him was a party to the Third Circuit litigation; the legality of appellee's authorization of the construction of the proposed hotel was not adjudicated in that suit. From the Third Circuit the plaintiffs sought an injunction restraining the construction of the proposed hotel and a declaration that the Contract of Disposition to the hotel corporation was null and void. Appellants here seek an order directing the Administrator of the HHFA to withdraw unlawful HHFA approval of the contract until the required analysis is made. Under settled law because of the differences in parties, and in the relief requested in the separate suits the prior judgment of the Third Circuit in no way requires this Court to render an equally erroneous judgment. *United States v. One Dodge Sedan*, 113 F. 2d 552, 554 (3rd Cir. 1940); *Moore v. United States*, 157 F. 2d 760, 764 (9th Cir. 1946) *cert. denied*, 330 U.S. 827 (1947); *Brown v. Brown*, 74 App. D.C. 309, 310, 122 F. 2d 219, 220 (D.C. Cir. 1941).

provision permitting the construction of an eight story hotel at the site now proposed misconstrues the law and exalts a technicality. Above all, the perfunctory reference to "Hotel" in the original Pittsburgh plan should not authorize the chief administrative officer of the Housing Agency to avoid the long standing policy of the very acts he is charged with administering—a policy of limiting federal aid to permanent residential construction.

B. The Statutory Purpose and Legislative History Contain "Reliable Indicia Showing a Congressional Intent" to Apply § 106(g) in the Present Circumstances.

The Third Circuit acknowledged that "it might be wise to employ the safeguard" of § 106(g) in regard to the Pittsburgh urban renewal plan. (309 F. 2d at 190) But "in the absence of reliable indicia showing a Congressional intent" the Court retreated to a literal reading of § 106(g) and held the plan to be beyond the safeguard of the Act. (*Ibid*).¹¹ We submit that the purposes of the Housing Act and the detailed legislative history of § 106(g) set forth below supply the "reliable indicia of Congressional intent" for want of which the Third Circuit felt itself compelled not to follow what it acknowledged as the "wise" course.

¹¹ The language of the Third Circuit is as follows: "The subsection does not prevent all future new construction of hotels or other housing for transient use unless a survey is made. It simply provides that *no provision* permitting such construction shall be included in the *urban renewal plan* unless it is determined that there is a need for such construction after an independent survey of the local supply has been made. Although the subsection requiring a survey does not specifically restrict the words 'no provision' to future ones only, and it might be wise to employ the safeguard of that subsection here, in the absence of reliable indicia showing a Congressional intent that the words include past approved ones, the subsection is not to be applied retroactively, that is, applied to urban renewal plans containing a provision permitting the construction of a transient housing unit which had been approved before the effective date of the 1959 Act." (Emphasis by the Court.) *Pittsburgh Hotels Association v. The Urban Redevelopment Authority of Pittsburgh*, 309 F. 2d at 190.

Congress intended by § 106(g) to prohibit the subsidized construction of surplus hotels in urban renewal areas. But the Third Circuit, confessing "the absence of reliable indicia" of such Congressional intent construed the statute literally and ruled to the contrary, that § 106(g) applied only to *provisions* in new renewal *plans*, and that it did not apply where an old plan had been approved before the statute even though no action whatever toward construction had been taken under the statute. This was error.

It is quite true that the statute uses the words "provision" and "plan". But the Court's literal interpretation of the section exalts text over context.¹² Congress was not promoting urban renewal *plans*, but rather urban *renewal*; it was not concerned with *provisions* for hotel construction but with hotel *construction*. The legislative history of § 106(g), presented herein, proves this unmistakably. Congress simply intended to prevent the subsidized *construction* of surplus hotels in urban renewal areas. That being the case, it is not important when the urban renewal plan was first approved, or when provisions permitting hotel construction were first included in a plan. What is important is when hotel construction is first proposed and scheduled to begin. For as we shall show below Congress intended, by § 106(g), to require that an analysis be made of the local supply of transient housing at some time prior to the construction of a hotel in an urban renewal area. The statutory purpose and legislative history here detailed, we submit, supply the "reliable indicia of Congressional intent," the absence of which led the Third Circuit to its contrary decision.

¹² As Judge Learned Hand has observed, "There is no surer way to misread any document than to read it literally." *Guiseppe v. Walling*, 144 F. 2d 608, 624 (2d Cir. 1944), *aff'd*, 324 U.S. 244 (1945). Noted with approval, *Smither & Co. v. Coles*, 100 App. D.C. 68 at 70, 242 F. 2d 220 at 222 (D.C. Cir.), *cert. denied*, 354 U.S. 914 (1957); and see *United States v. Brennan*, 94 App. D.C. 184 at 186, 214 F. 2d 268 at 270 (D.C. Cir.), *cert. denied*, 348 U.S. 830 (1954).

1. Statutory Purpose.

Even without knowledge of the specific legislative intent behind § 106(g) set forth below it would indeed have been "wise" had the Third Circuit employed the safeguard of the Act in the Pittsburgh urban renewal area. For then the courts' decision would have harmonized with the general policy of all the federal housing acts, a policy of promoting the construction of permanent residences, not hotels. As Congress has declared, "the basic purpose of the various Government-assisted housing programs is to assist sound permanent housing for *residential* use." Hotel construction is limited under all housing programs administered by appellee and the HHFA.¹³ For example, the National Housing Act, relating to FHA mortgage insurance, contains the following provision:

"The Congress hereby declares that it has been its intent since the enactment of the National Housing Act that housing built with the aid of mortgages insured under that Act is to be used principally for residential use; and that this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding." (68 Stat. 610 (1954), 17 U.S.C. § 1731(b))

Similarly, as noted above, Title I of the Housing Act of 1949 under which this case arises limits commercial construction in urban renewal areas and dictates that: "Financial assistance shall not be extended . . . with respect to

¹³ See e.g., 68 Stat. 610 (1954) 12 U.S.C. § 1731b(a); *FHA v. The Darlington Inc.*, 358 U.S. 84 (1958); H.R. Rep. No. 2359 of the House Committee on Banking and Currency on S. 4035, the Housing Act of 1958, 85th Cong., 2d Sess., 33, 40 (1958):

"Your committee wishes to call attention to previous declarations by the Congress that the basic purpose of the various Government-assisted housing programs is to assist sound permanent housing for *residential* use. Your committee wishes to reaffirm its intention that the prohibition against transient or hotel use is applicable to all housing programs, whether of an insurance or a loan category, and authorized within the various programs under the Housing and Home Finance Administrator." (Emphasis in original.)

any urban renewal area which is not predominantly residential in character and which is not to be redeveloped for predominantly residential uses." 70 Stat. 1097 (1956), as amended, 42 U.S.C. § 1460(c).

2. The Legislative History of § 106(g) Clearly Shows an Intention that the Section be Applied Remedially to All New Construction.

Section 106(g) was enacted as part of the omnibus housing legislation known as the Housing Act of 1959, 73 Stat. 654, 674 (1959). Much of this Act was embroiled in controversy because of the differing points of view which existed at the time among the two Houses of Congress and the President on the appropriate role of the Federal Government in a public housing program. The first two attempts at housing legislation in 1959, respectively, S. 57 and S. 2539, 86th Cong., 1st Sess., met with Presidential vetoes, because the President did not approve of the amounts of money allocated by Congress for public housing construction. Only at the very end of the session was a satisfactory compromise reached and a bill passed by Congress that was acceptable to the President. (S. 2654, 86th Cong., 1st Sess. (1959)).

It is crystal clear, however, that none of this controversy touched in any way on § 106(g). Provisions almost identical to present § 106(g) were inserted into S. 57, the first housing bill passed by the House of Representatives in 1959, and were repeated with almost no modification in every subsequent proposed housing bill of both Houses until finally enacted.

The original proposal was as follows:

"(g) The provision of assistance under this title is intended to bring about the redevelopment of urban renewal areas for permanent residential use; and no provision permitting the construction of hotels or other housing for transient use in the redevelopment of such area shall be included in the urban renewal plan unless the community in which the project

is located, under regulations prescribed by the Administrator, has caused to be made a competent independent analysis of the local supply of transient housing and as a result thereof has determined that there exists in the area a need for additional units of such housing." (105 Cong. Rec. 8815 (May 21, 1959)).

The first twenty-three words were omitted as unnecessary in all bills subsequent to S. 57. Apart from this one change the provision was repeated *in haec verba* in all proposed housing bills until enacted into law.

Under the circumstances, the specific legislative history of § 106(g) must be drawn from references to discussion of the subject in the course of deliberation on the various housing bills considered in 1959, and not merely to the bill finally signed. We repeat, that provisions identical to § 106(g) as enacted were simply carried along in the housing bills from first to last, and that the quotations hereafter, while cited to various bills, are all references to provisions identical to present § 106(g), with the slight exception noted above.

a. The First Proposed Bill

Section 106(g) first appeared in an early draft of the 1959 Housing Act as a floor amendment to S. 57, proposed during debate in the House by Congressman Albert Rains. Mr. Rains was Chairman of the Subcommittee on Housing of the House Committee on Banking and Currency. In offering the amendment, he made the following statement:

"Mr. Rains. Mr. Chairman, in explanation of the amendment I point out that this amendment was approved both in subcommittee and in the full committee. It was the full intention to put the direction as to making this survey with reference to hotels in the committee report. Through inadvertence, and only through inadvertence, this was left out. For this reason, since it was the intent of the committee both times to do this, *I offer the amendment which would make it necessary for a survey to be made before a new*

hotel could be built in an urban renewal area. Of course, anybody would know that such a survey should be made to see whether or not such a hotel was needed." (105 Cong. Rec. 8815 (May 21, 1959)).

The amendment was passed by the House.

The Joint Senate-House Conference Committee approved the House amendment. The Senate Conferees explained the new provision to the Senate as follows:

"Section 409—Amends Section 106 of the Housing Act of 1949 to prohibit hotels and other transient housing from being *constructed* in urban renewal areas unless the community obtains a competent independent analysis of local supply of such housing and determines that there is a need for such housing."¹⁴

Both the House and the Senate approved the bill reported by the Conference Committee,¹⁵ but President Eisenhower vetoed the proposed legislation (S. 57) because the amount appropriated by Congress for public housing purposes was in his opinion too large.¹⁶

Thereafter a succession of omnibus housing bills was introduced in both Houses, all of which contained provisions identical to present § 106(g). The Housing and Home Finance Agency, representing the Administration, submitted the following comments on present § 106(g) contained in various bills then pending before the Senate:

"70. Hotel and Other Transient Housing. Is contained in both S. 57 and S. 2378, and is acceptable to

¹⁴ Sen. Rep., Section-by-Section Summary of the Provisions of S. 57 as Agreed to in Conference, Committee Print, Senate Committee on Banking and Currency, 86th Cong., 1st Sess., 11 (1959).

¹⁵ 105 Cong. Rec. 11474 (June 22, 1959), Senate passage; 105 Cong. Rec. 11624 (June 23, 1959), House passage.

¹⁶ Sen. Doc. 34, Veto Message, Housing Act of 1959, S. 57, 86th Cong., 1st Sess. (July 7, 1959).

the Agency. *Prohibits construction of hotels and transient housing without certain prior analysis.*"¹⁷

b. The Second Proposed Bill

S. 2539 was the second major housing bill of 1959 considered. It carried over all of the undisputed sections of S. 57, including the provisions of § 106(g), and attempted to meet the President's objections.¹⁸ Both the Senate and the House Committees on Banking and Currency reported the bill with the identical comment:

"Hotels and Other Transient Housing.

"Section 410—Amends section 106 of the Housing Act of 1949 to prohibit hotels and other transient housing from being *constructed* in urban renewal areas unless the community obtains a competent independent analysis of local supply of such housing and determines that there is a need for such housing."¹⁹

S. 2539 was passed by Congress, but it, too, was vetoed by the President, again because he believed the public housing appropriations to be too large.²⁰

c. The Third Proposed Bill (Enacted as the Present Statute).

Finally, at the end of the 1959 Session, a third attempt was made to pass a housing bill that would be satisfactory to the President. This time the vehicle was S. 2654, which again simply carried forward all of the undisputed sections

¹⁷ "Housing and Home Finance Agency. Comments on Numbered Items in Agenda of Senate Committee on Banking and Currency Relating to Housing Act of 1959 (S. 57, S. 612, S. 2378, 86th Congress)." IV-3 (July 23, 1959).

¹⁸ Sec. 410, S. 2539, 86th Cong., 1st Sess., submitted in the Senate August 13, 1959.

¹⁹ Sen. Rep. No. 715, 86th Cong., 1st Sess., 20 (1959); H.R. Rep. No. 1040, 86th Cong., 1st Sess., 18 (1959).

²⁰ 105 Cong. Rec. 16177 (August 18, 1959), Senate passage; 105 Cong. Rec. 17226 (August 27, 1959), House passage; vetoed by President, September 4, 1959, Sen. Doc. No. 52, 86th Cong., 1st Sess., (1959).

of the two previously vetoed bills, including the hotel analysis provisions of § 106(g),²¹ and compromised the differences between Congress and the President. The Senate Committee on Banking and Currency repeated its prior comments on the hotel section:

“Section 410—Amends Section 106 of the Housing Act of 1949 to prohibit hotels and other transient housing from being *constructed* in an urban renewal area unless the community obtains a competent independent analysis of local supply of such housing and determines that there is a need for such housing.”²²

Because of the lateness of the session, there was no House report on S. 2654.

Congress passed S. 2654 in the middle of September 1959, and shortly thereafter the President signed it into law as the Housing Act of 1959.²³

d. Summary of Legislative History of § 106(g).

In summary, the comments of those most responsible for the legislation clearly indicate that Congress intended § 106(g) to apply as a precondition to all hotel *construction*.

1. Congressman Albert Rains, Chairman of the Subcommittee on Housing of the House of Representatives, submitted § 106(g) as a floor amendment to the first proposed housing bill (S. 57) during early House debate with this comment:

“I offer the amendment which would make it necessary for a survey to be made before a new hotel could

²¹ Sec. 410, S. 2654, 86th Cong., 1st Sess., introduced in Senate on September 8, 1959.

²² S. Rep. No. 924, 86th Cong., 1st Sess., Report of the Committee on Banking and Currency to Accompany S. 2654, 20 (September 8, 1959).

²³ 105 Cong. Rec. 18765 (September 9, 1959), Senate passage; 105 Cong. Rec. 18995 (September 10, 1959), House passage; the President signed S. 2654 on September 23, 1959 (73 Stat. 654).

be *built* in an urban renewal area. Of course, anybody would know that such a survey should be made to see whether or not such a hotel was needed."²⁴

2. The members of the Senate who were part of the first Conference Committee considering the proposed Housing Act accepted the House amendment of § 106(g) and reported to the full Senate that § 106(g) would:

"Prohibit hotels and other transient housing from being *constructed* in urban renewal areas unless the community obtains a competent independent analysis of the local supply of such housing and determines that there is a need for such housing."²⁵

3. The Housing and Home Finance Agency, charged with representing the Administration during Congressional consideration of the housing legislation, and charged with administering the law after its passage, declared in a contemporaneous construction of § 106(g) as it appeared in various bills then under consideration that it:

"Prohibits *construction* of hotels and transient housing without certain prior analysis."²⁶

4. Both the Senate and House Committees on Banking and Currency approvingly reported provisions identical to § 106(g) as passed with the same statement that the section would:

"prohibit hotels and other transient housing from being *constructed* in an urban renewal area unless the community obtains a competent independent analysis of local supply of such housing and determines that there is a need for such housing."²⁷

²⁴ See pages 24-25, *supra*.

²⁵ See note 14, *supra*.

²⁶ See note 17, *supra*.

²⁷ See note 19, *supra*.

This unambiguous legislative history proves beyond question that Congress passed § 106(g) to prevent *construction* of hotels in all federally subsidized urban renewal areas, unless a survey of the area specifically indicated a need for additional hotels. When, as in the instant case, there has been no reliance on the plan as it existed prior to 1959, where *negotiations* to build the now proposed hotel were commenced *more than a year* after § 106(g) was adopted, and where construction has not begun, four years after the amendment of the Act, the simple requirements of § 106(g) must be followed. Indeed, it is difficult to see why they have not been followed, for they impose but one obligation on the appellee—to require an easily obtainable survey before authorizing the federally subsidized construction of a new hotel. And as Congressman Rains put it, “anybody would know that such a survey should be made to see whether or not such a hotel was needed.” (105 Cong. Rec. 8815 (May 21, 1959)).

Nevertheless, such an analysis has not been made in the instant case, and if made, admittedly it would show an oversupply of hotel rooms. (J.A. p. 7) Until such analysis is made of the Pittsburgh area it is unlawful for appellee to continue the authorization for the proposed hotel construction.

It is highly questionable whether the Third Circuit was entitled to disregard the general policy of the various Federal housing programs and rely exclusively on the literal language of § 106(g) merely because it lacked “reliable indicia” of the intended purpose of that specific section. But, in light of the clear expressions of Congressional intent presented herein there can be no doubt that the Third Circuit decision was wrong. Indeed, the Court’s opinion indicates that had this legislative history been presented in the former case a contrary result would

have been reached,²⁸ for the "wise" course noted by the Court, and the intentions of Congress as evidenced by the legislative history, are identical. As we have shown, both the Court and Congress believed it "wise" to safeguard existing hotels by requiring proof of need before permitting the subsidized construction of new hotels in an urban renewal area.

What finally appears is that § 106(g) was intended to amplify the long standing policy of the various housing acts, and to give real protection to existing hotels, by confining urban redevelopment construction to permanent residential housing. It was intended to apply prospectively and to require a survey of need as a precondition to all future hotel construction. As a remedial statute it is entitled to a liberal interpretation that carries out this Congressional policy. *Miller v. Robertson*, 266 U.S. 243, 248 (1924). Certainly the casual listing of "Hotel," as a possible commercial activity, in the Pittsburgh plan in 1955 in no way impedes the application of such policy to the presently proposed hotel, when no such hotel was contemplated prior to 1959 and no construction has yet begun. Above all, the perfunctory reference to "Hotel" in the original Pittsburgh plan cannot authorize the chief administrative officer of the Housing Agency to avoid the long standing policy of the very acts he is charged with administering.

C. Congress Clearly Had Power to Impose Section 106(g) as an Additional Requirement on the 1955 Contract for Loan and Grant Between Appellee and the Pittsburgh Urban Renewal Agency.

That in the instant case a Loan and Grant Contract was entered by HHFA and the Pittsburgh Urban Renewal Au-

²⁸ This detailed a legislative history was not presented to the Third Circuit. The District Court had given scant notice to the legislative history, and it was not realized at the time the great weight the Court of Appeals would give to the absence of such information.

thority prior to the addition of § 106(g) to the Housing Act does not exonerate the appellee of his failure to enforce the amendment. Contracts dealing with a subject matter which lies within the control of Congress have "a congenital infirmity"—they are always subject to further Congressional regulation. (*Norman v. B. & O. R.R. Co.*, 294 U.S. 240 at 307-308 (1935)). In *F.H.A. v. The Darlington, Inc.*, 358 U.S. 84 (1958), a case decided under the Housing Act, the Supreme Court held that Congress may impose on an existing contract the additional requirement that the subject property not be used as a hotel. The Court stated:

"Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. *Immunity from federal regulation is not gained through forehanded contracts.*

"Congress by the 1954 Act was doing no more than protecting the regulatory system which it had designed. Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." (358 U.S. at 91-92).

Darlington is controlling here. Furthermore, as seen, compliance with the law can cause no injury to the Pittsburgh Urban Renewal Agency or anyone else—no walls need be knocked down nor foundations uprooted. There was no reliance on the original plan, no negotiations leading toward the construction of the hotel until more than a year after § 106(g) was enacted and no construction has commenced on the building even to this date.

II. APPELLANTS HAVE STANDING TO SUE FOR REDRESS UNDER SECTION 10(a) OF THE ADMINISTRATIVE PROCEDURE ACT.

A. The Housing Act Was Passed to Protect Appellants and Other Hotels and Appellee's Refusal to Enforce This Section Was a Violation of Appellants' Legal Rights Which Will Result in Concrete, Substantial and Irreparable Injury to Appellants.

Appellants never had an opportunity to prove the facts of their case. The District Court dismissed the complaint without opinion, stating in its order only "that the motion of defendant to dismiss on the ground that the court lacks jurisdiction over the subject matter in that plaintiffs lack standing to sue, be and the same is hereby granted." (J.A. p. A17). The court erred in its determination as to jurisdiction²⁹ as well as in its determination as to standing.

If § 106(g) applies to the proposed hotel, as appellants contend in the first part of this brief, then it is believed that appellee does not contest the fact that appellants do have standing to maintain this suit. In argument before the District Court appellee conceded that if the Pittsburgh project had been initiated at a time when all agree the survey requirement of § 106(g) is applicable, appellants "would have standing to sue" for appellee's violation of the statute, "conceivably, because the statute in that language would give them authority to." (J.A. p. A15).

By approving the construction of the proposed hotel in the Pittsburgh urban renewal area without requiring a prior showing of need, appellee has violated the Housing Act and breached his duty to appellants to compel compliance with § 106(g). As a result, appellants will suffer such injury as establishes their standing to maintain this suit

²⁹ This case arose under the laws of the United States and the amount in controversy exceeds ten thousand dollars. (J.A. p. A3). The District Court was clearly vested with jurisdiction under 28 U.S.C. § 1331. As the Supreme Court has held, the determination of standing is in itself an exercise of jurisdiction. (*General Investment Co. v. New York Central Railroad Co.*, 271 U.S. 228, 230, 231 (1926)).

as persons suffering "legal wrong" under § 10(a) of the Administrative Procedure Act, 5 U.S.C. § 1009(a).

Appellants are not alleging injury in some indefinite form in common with people generally. It is clear that appellants are affected "concretely, substantially and irreparably" by appellee's action. Furthermore Congress passed § 106(g) to protect appellants from the very form of unfair competition now facing them—the competition caused by the subsidized construction of hotels in an area where they are not needed. At least in § 106(g) Congress created definite statutory rights and duties personal to the appellants. These rights cannot be enforced by the people generally, but only by the appellants. Cf. *Stark v. Wickard*, 321 U.S. 288 at 304 (1944); *Fleming v. Moberly Milk Products Co.*, 82 App. D.C. 16, 21, 160 F. 2d 259, 264 (D.C. Cir. 1947).

1. Appellants Are Members of the Class for Whose Especial Benefit Congress Passed § 106(g).

Section 106(g) mentions only hotels, and its terms alone would indicate that it was intended to benefit hotels. That is the fact. In 1956,³⁰ in 1958,³¹ and again in 1959,³² representatives of the American Hotel Association described to Congress the industry problems resulting from the sub-

³⁰ Hearings on H.R. 10157, The Housing Act of 1956 before the House Committee on Banking and Currency, 84th Cong., 2d Sess., 432, 434 (May 18, 1956).

³¹ Hearings on the Housing Act of 1958 before the Subcommittee on Housing of the House Committee on Banking and Currency, 85th Cong., 2d Sess., 740 (1958); Hearings on Various Bills to Amend the Federal Housing Laws before a Subcommittee of the Senate Committee on Banking and Currency, 85th Cong., 2d Sess., 451 (1958).

³² Hearings on the Housing Act of 1959 before the Subcommittee on Housing of the House Committee on Banking and Currency, 86th Cong., 1st Sess., 705 (1959); Hearings on Various Bills to Amend the Federal Housing Laws before the Senate Committee on Banking and Currency, 86th Cong., 1st Sess., 754 (1959); Hearings on the President's Message Disapproving S. 57, The Housing Act of 1959 before a Subcommittee of the Senate Committee on Banking and Currency, 86th Cong., 1st Sess., 577 (1959).

sidized construction of surplus hotel rooms. It was pointed out that a hotel is essentially a single-purpose building, and unlike other commercial establishments it cannot be used in a variety of ways depending on competition and need. The hotels petitioned for some form of protection under the Housing Act, and suggested the survey requirement that became § 106(g).

HHFA publicly recognized that § 106(g) was intended to protect only existing hotels. Indeed, this has been partly the basis of HHFA's continuing opposition to § 106(g), for it claimed that "there is absolutely no reason to single out any particular industry for this type of procedure,"³³ and that "there [are no] special reasons which would justify singling out this particular use for subjection to a strictly Federal requirement."³⁴ In addition it argued that any provisions which would protect hotels would also restrict the right of the local authorities to dispose of renewal land at high prices for hotel construction and could increase the liability for subsidy payments imposed on the Federal government.

Nevertheless, Congress, declaring that the "basic purpose of the various Government-assisted housing programs is to assist sound permanent housing for *residential* use," believed existing hotels were at least entitled to the limited protection of § 106(g).³⁵

³³ Attachments to Items in Conference Agenda, Supplemental Statements of HHFA on Administration Positions, Agenda Item No. 48, "Special Provisions to Restrict Hotel Construction on Urban Renewal Sites," (June, 1959).

³⁴ Statement of Robert C. Weaver, Administrator, Housing and Home Finance Agency, Hearings before the Subcommittee on Housing of the House Committee on Banking and Currency, 87th Cong., 1st Sess., 44 at 126 (April 24, 1961).

³⁵ H.R. Rep. No. 2359, 85th Cong., 2d Sess., of the House Committee on Banking and Currency on S. 4035, the Housing Act of 1958, 32 (Aug. 2, 1958) (Emphasis in original); see also Statement of Mr. A. J. Packard in behalf of the American Hotel Association, Hearings on the Housing Act of 1959, before the Subcommittee on Housing of The House Committee on Banking and Currency, 86th Cong., 1st Sess., 705 (Feb. 3, 1959).

From the language of the Act, the history of its passage, the admissions by HHFA, it is beyond question that appellants, in the words of the Supreme Court, are members "of a class for whose especial benefit the statute was enacted." (*Texas & Pac. R. Co. v. Rigsby*, 241 U.S. 33 at 39 (1916)).

2. Appellants Have Suffered "Legal Wrong."

This Court has previously decided that "legal wrong" of § 10(a) of the Administrative Procedure Act is "such wrong as . . . the courts have recognized as grounds for judicial review." *Kansas City Power & Light Co. v. McKay*, 96 App. D.C. 273 at 281, 225 F. 2d 924 at 932 (D.C. Cir), *cert. denied*, 350 U.S. 884 (1955). Under just such circumstances as presented by the instant case the Supreme Court has recognized that a right of review does exist, for that Court has ruled that the "disregard of the command of the statute . . . [which] results in damage to one of the class for whose especial benefit the statute was passed" is grounds for judicial review (*Texas & Pac. R. Co. v. Rigsby*, 241 U.S. 33 at 39 (1916)). More recently, this court decided that:

"When a person affected concretely, substantially and irreparably by administrative action, complains that the action is in direct violation of a statutory prohibition, the courts have power to entertain the complaint, and if it is proved to be well founded in fact and in law, to enjoin the action." (*Fleming v. Moberly Milk Products Co.*, 82 App. D.C. at 21, 160 F. 2d at 264).

It follows that appellee's violation of the prohibition of § 106(g), which admittedly will result in concrete, substantial and irreparable damage to appellants, who are members of the class for whose especial benefit § 106(g) was passed, is grounds for judicial review. The District Court was in error in dismissing appellants' complaint.

B. Congress Intended That § 106(g) Would Be Enforced.

It must be borne in mind that if appellants cannot pursue enforcement of § 106(g) then that section will not be enforced at all. HHFA originally opposed enactment of § 106(g); it has effectively refused to administer it by interpreting it in a manner so restrictive as to deprive it of any useful meaning;³⁶ it has published no regulations which might permit the local urban renewal agencies to discharge their responsibilities under the law; and it has petitioned Congress for outright repeal.³⁷ This petition was rejected. But if the appellee is now successful it will have obtained from this Court, in practical effect, the very repeal it vainly sought from Congress.

Such a result would be contrary to the accepted practices of statutory interpretation. As the Supreme Court has stated:

“The definite prohibition which Congress inserted in the act cannot therefore be overridden in the view that Congress intended it to be ignored. As the prohibition was appropriate to the aim of Congress and is capable of enforcement, the conclusion must

³⁶ The Chairman of the Subcommittee on Housing of the House Committee on Banking and Currency has expressed the Subcommittee's concern over the manner in which the HHFA staff “seem to be trying to get around the statute with reference to a survey.” Hearings on the Housing Act of 1961 before the Subcommittee on Housing of the House Committee on Banking and Currency, 87th Cong., 1st Sess., 397 (April 28, 1961).

³⁷ See § 604 of H.R. 6028, 87th Cong., 1st Sess., (1961) proposed by HHFA to repeal § 106(g) of the Housing Act of 1949, and see statement of Robert C. Weaver, HHFA Administrator in support thereof, Hearings before the Subcommittee on Housing of the House Committee on Banking and Currency, 87th Cong., 1st Sess., 44 at 125-26 (April 24, 1961). See also statement of the Chairman of the Subcommittee at the same hearings:

“This committee, as you well know, has expressed itself many times on that issue [surveys prior to hotel construction] and I don't feel that they are going to be very interested in repealing that section . . . there is no need to go into details with this committee about the need for a survey in urban renewal.” (*Id.* at 397).

be that enforcement was contemplated." (*Texas & N.O.R. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548 at 569 (1930)).

Enforcement of § 106(g) was indeed contemplated, but appellee has abdicated that responsibility. Only the appellants, the intended direct beneficiaries of the section, are eligible now to seek such enforcement.

Notwithstanding the contention that HHFA has never chosen to enforce § 106(g), the appellee at one point argued in the court below that the only restraint on HHFA was self-restraint, that § 106(g) could only be enforced by "higher-ups in the government itself . . . the officials in control—for instance, the Administrator of Housing and Home Finance Agency." (J.A. pp. A13-A14). And even if the Administrator himself opposed the enforcement of § 106(g), as in this case, the appellee contended that "[no] private citizen would have any right to contest that." (J.A. p. A14). Appellee seeks to put himself beyond the law by urging that the powers of the executive are absolute. But according to this Court, "executive absolutism" is "a concept unknown to our law." *Fleming v. Moberly Milk Products Co.*, 82 App. D.C. 16, 22; 160 F. 2d 259 at 264, 265 (D.C. Cir. 1947).

By section 106(g), Congress made it the duty of appellee to prohibit the construction of hotels on urban renewal property without proof of the need for more hotels, in order to protect appellants from the unfair competition which results from the subsidized construction of surplus hotel rooms. Appellee has violated that duty. While the Housing Act provides no statutory procedure for judicial review, it cannot be that Congress created a mere illusory right for appellants which would fail for lack of means to enforce it. Cf. *Laughlin v. Riddle Aviation Co.*, 205 F. 2d 948 at 949 (5th Cir. 1953). It is the rule that where there be an admitted wrong the courts

will look far to supply an adequate remedy. As long ago as *Marbury v. Madison*, 5 U.S. 137 (1803) it was said:

"But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy . . . it is a general and indisputable rule that where there is a legal right there is also a legal remedy by suit or action at law whenever that right is invaded." (5 U.S. at 165, 166).

Particularly should this be the rule where arbitrary conduct by the administrator of a Federal agency is alleged, for this is the very conduct at which the Administrative Procedure Act was aimed.

Justice Brandeis stated the controlling principle in agency review cases to be as follows: "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied and whether the proceeding in which facts were adjudicated was conducted regularly." (*St. Joseph Stockyards Co. v. United States*, 298 U.S. 38 at 84 (1936) concurring opinion). Under the circumstances presented herein, appellants are entitled to that one opportunity in court for a determination of the merits of their case.

CONCLUSION

Applying the foregoing legal principles to the allegations of the complaint, it is clear that appellants have standing to challenge appellee's disregard of the requirements of the Housing Act. The District Court erred in dismissing the complaint. Accordingly, the judgment below should be reversed.

Respectfully submitted,

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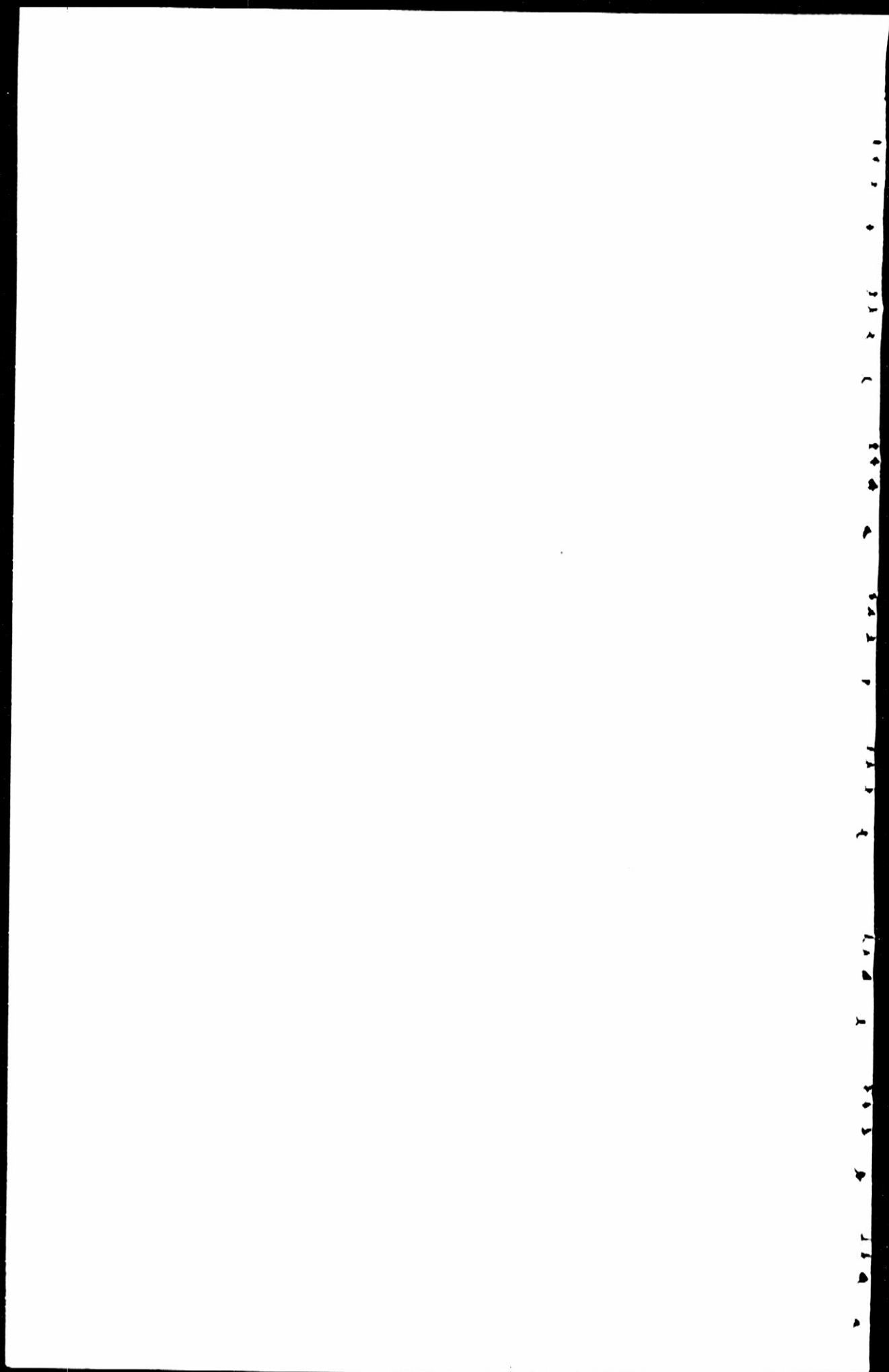
Of Counsel:

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1229-19th St., N. W.

Washington 36, D. C.

Dated: September 9, 1963



JOINT APPENDIX

Relevant Docket Entries

PROCEEDINGS

Date

1963

Feb. 5—Complaint, Appearance—filed

Feb. 5—Summons, copies (3) and copies (3) of Complaint issued ser 2-6-3; U. S. Atty. ser 2-6-63 Atty. Gen. ser. 2-9-63

Mar. 7—Motion of defendant to dismiss; c/m 3-7-63; P & A; Appearance of David C. Acheson, Charles T. Duncan, Joseph M. Hannon & Ellen Lee Park. MC 3-7-63—filed

Mar. 14—Opposition of plaintiffs to motion to dismiss; c/m 3-14-63.—filed

Apr. 23—Motion to dismiss argued and submitted. (Rep: Romig) Youngdahl, J.

April 24—Order granting motion of defendant to dismiss. (N) Youngdahl, J.

May 10—Transcript of proceeding, 4-23-63; pp. 1-10 (Rep. Edna B. Romig, court's copy)—filed

June 19—Notice of appeal by plaintiffs; copy mailed to Ellen Lee Park, Asst. U. S. Atty; deposit by Garbow, \$5.00.

June 19—Appearance of Arnold, Fortas & Porter for plaintiffs.—filed

July 15—Record on appeal delivered to USCA by Frank Nebeker, Asst. U. S. Atty.—(Clerk's fee 80¢—No charge USA)—filed

July 15—Receipt from USCA for original papers.—filed

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT
OF COLUMBIA

Civil Action No. 317-'63

HILTON HOTELS CORPORATION, 720 South Michigan Avenue,
Chicago 5, Illinois

ALLEGHENY HOTEL CORPORATION, 607 Penn Avenue,
Pittsburgh 22, Pennsylvania

SHERATON MID-CONTINENT CORPORATION, 1806 Douglas
Street, Omaha 2, Nebraska

Plaintiffs

v.

ROBERT C. WEAVER, Administrator of the Housing and Home
Finance Agency, 1626 "K" Street, N. W., Washington,
District of Columbia, *Defendant*

**Complaint for Mandatory Injunction and Other
Equitable Relief**

1. Plaintiff Hilton Hotels Corporation is a corporation incorporated under and by virtue of the laws of the State of Delaware and has its principal place of business at 720 South Michigan Avenue, Chicago 5, Illinois. It owns and operates the Pittsburgh Hilton Hotel located at Gateway Center in the City of Pittsburgh, Allegheny County, Pennsylvania.

2. Plaintiff Allegheny Hotel Corporation is a corporation incorporated under and by virtue of the laws of the Commonwealth of Pennsylvania. It owns and operates the Pick-Roosevelt Hotel located at 607 Penn Avenue, Pittsburgh 22, Allegheny County, Pennsylvania, and has its principal place of business at said address.

3. Plaintiff Sheraton Mid-Continent Corporation is a corporation incorporated under and by virtue of the laws of the State of Delaware and has its principal place of business at 1806 Douglas Street, Omaha 2, Nebraska. It owns and operates the Penn-Sheraton Hotel located at

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William Penn Place, Pittsburgh, Allegheny County, Pennsylvania.

4. Defendant Robert C. Weaver is Administrator of the Housing and Home Finance Agency with his offices located at 1626 K Street N.W. in the City of Washington, District of Columbia.

5. The Urban Redevelopment Authority of Pittsburgh, hereinafter referred to as the "Authority", is a redevelopment authority established and existing under the Pennsylvania Urban Redevelopment Law of 1945, P.L. 991, 35 Purdons Pa. Stat. Ann. 1701, as amended.

6. This action arises under the Act of July 15, 1949, U.S.C., Title 42 Sec. 1441 et seq., as amended by the Act of September 23, 1959, P.L. 86-372, Stat. 673, 674, 676; U.S.C. Title 42, Sec. 1456(g) and under the Administrative Procedure Act, 5 U.S.C. 1001-1009. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand (\$10,000.00) Dollars.

7. The Act of July 15, 1949, 63 Stat. 413, 42 U.S.C. 1441 et seq., known as the Housing Act of 1949, deals with Slum Clearance and Community Development.

8. The Amendment of 1954, 68 Stat. 590, 42 U.S.C. 1441 et seq., known as the Housing Act of 1954, amended the Housing Act of 1949 and authorized the establishment of an Urban Renewal Fund and the grant of monies from said fund for certain specific purposes and in accordance with the statutes involved and the regulations of the Administrator of the HHFA.

9. On September 23, 1959 the Housing Act of 1959 was enacted. Section 410(g) of said Act, 42 U.S.C.A. 1456(g) amended the Housing Act of 1959, 42 U.S.C.A. 1441 et seq. as follows:

"Sec. 410. Section 106 of the Housing Act of 1949 is further amended by adding at the end thereof the following new subsection:

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‘(g) No provision permitting the new construction of hotels or other housing for transient use in the redevelopment of any urban renewal area under this title shall be included in the urban renewal plan unless the community in which the project is located, under regulations prescribed by the Administrator, has caused to be made a competent independent analysis of the local supply of transient housing and as a result thereof has determined that there exists in the area a need for additional units of such housing’ ”.

10. In accordance with the provisions of the Pennsylvania Urban Redevelopment Law of 1945, P.L. 991, 35 P.S. 1701 et seq., the City Planning Commission of the City of Pittsburgh, Pennsylvania prepared a Redevelopment Area Plan dated June 7, 1955 for the redevelopment of a certain area in the Second and Third Wards of the City of Pittsburgh. Such redevelopment area is a part of the Lower Hill District adjoining the central business district of said City and consists of 46 City blocks, together with access streets, comprising a total of 105 acres. Such area was designated as “Redevelopment Area No. 3”.

11. Said Redevelopment Area Plan provided for the redevelopment of various parcels of land classifying the area into commercial, cultural, parking, street and residential uses and designated the location of streets in said plan. The parcel of such area with which the actions and omissions of defendant were concerned most directly and which directly affect plaintiffs is known as Parcel “B” and contains approximately 5.3 acres of land abutting and North of Fifth Avenue and abutting and East of the Liberty Crosstown Thorofare. Part of this site formerly was occupied by St. Peter’s Church. This parcel in the plan was designated as commercial and had a street named Chatham Street, 60 feet wide, running across it.

12. Said Redevelopment Area Plan contained a provision that a hotel was a permitted use on land designated as com-

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mercial. The portion covered by Chatham Street was to be used as a public thorofare, and no structure was permitted thereon. The plan also provided for special controls for designated areas and limited the height of any building or structure to be constructed on part of Parcel "B" to two stories or 20 feet.

13. The Redevelopment Area Plan was approved by the Authority and the City of Pittsburgh. A Loan and Grant Contract was entered into between the Authority and the United States of America, dated October 11, 1955, wherein the United States agreed to make, and did make capital grants and loans to the Authority for the purpose of carrying out the proposed project. Certain terms and conditions of said agreement were waived by the United States on three occasions: namely, May 8 and July 26, 1956 and November 30, 1960. Said contract also was amended on five occasions: namely, June 5, 1957, December 1, 1958, December 29, 1959, June 30, 1960, November 30, 1960 and August 10, 1961.

14. The Redevelopment Plan was modified by Modification No. 1 on March 4, 1957 reducing the width of Chatham Street across Parcel "B" to 44 feet, and by Modification No. 2 on September 27, 1960 which, inter alia, entirely removed Chatham Street from intersecting Parcel "B". No new use was assigned to the land.

15. The waiver of November 30, 1960, the third, fourth and fifth amendments to the Loan and Grant Contract and Modification No. 2 all were made subsequent to the Housing Act of 1959.

16. Prior to the aforesaid Housing Act of 1959 no negotiations, planning, financing, commitment, agreement or option to construct a hotel on any of the property within the plan had been undertaken by the Authority.

17. Neither the City of Pittsburgh, which is the governing body of the community in which the proposed hotel is

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to be located, nor the Authority has caused to be made an independent analysis or survey of the local supply of transient housing facilities as required by the Housing Act of 1949 as amended by the Housing Act of 1959 and which applies to the Redevelopment Plan and its amendments.

18. On November 1, 1960 Joseph S. Wohl and Leon Falk, Jr., on behalf of themselves and a corporation to be organized by them, made an offer to the Authority for a six-month option to enter into a 99-year lease for the purpose of redevelopment of the parcel in question with an 8-story motor hotel in excess of 20 feet in height. Under the offer no money is to be paid now and the officers are given use of the land without cost for the first two years after exercising their option. During the third to seventh year, inclusive, the rent would be \$189,000.00 annually. Thereafter the rent would be at the rate of \$135,000.00 per annum. The offer gave the lessees the right to purchase the parcel at any time during the 99-year term of the lease for a price of \$2,500,000.00.

19. The proposed corporation was organized by Joseph S. Wohl and Leon Falk, Jr. as the Golden Triangle Motor Hotel, Inc. The Authority accepted the offer, granting the six-month option to the Golden Triangle Motor Hotel, Inc., subject, however, to execution of a mutually agreeable redevelopment and disposition contract and approval of same by the City of Pittsburgh and the HHFA. The time for the exercise of said option by the corporation has been extended on three occasions.

20. A disposition contract for the aforementioned Parcel "B", which would permit the construction of the luxury hotel on the site formerly occupied by St. Peter's Church and which includes the option contract, was entered on June 8, 1961, amended on several occasions and approved on November 20, 1961 by the HHFA in violation of promulgated and published regulations of the HHFA applicable to said project.

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21. The disposition contract for said parcel, including the option contract and extensions of same, were approved by the HHFA despite the open, apparent and present violations of the Housing Act of 1949 as amended by the Housing Act of 1959 and the published regulations and procedures of the HHFA.

22. The defendant has refused to direct the City of Pittsburgh or the Authority to cause a competent independent analysis of the local supply of transient housing to be made and no said survey or determination that there exists in the area a need for additional units of such housing has been made by the City of Pittsburgh, the Authority, the HHFA or the defendant.

23. There was in 1959 and there has existed to the present date a surplus of the local supply of transient housing in Pittsburgh, Pennsylvania and defendant has been informed that a competent independent analysis would reveal same.

24. Defendant has failed to carry out the duties and obligations of the Housing Act of 1949 as amended by the Housing Act of 1959 and has arbitrarily, unreasonably and capriciously neglected and still does neglect to enforce said acts prohibiting the construction of additional transient housing in said plan until there has been a competent independent analysis made of the local supply of transient housing and a determination made of a need for additional units.

25. Defendant arbitrarily and capriciously has refused and neglected to apply the published regulations and procedures of the HHFA to this particular project and has ignored evidence showing noncompliance with same.

26. As a result of the aforesaid acts and omissions to act of defendant, plaintiffs will be injured and damaged irreparably by the loss of customers, injury to business, prop-

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erty and unlawful competition approved, created and permitted by defendant through his action in refusing and neglecting to enforce the Housing Act of 1949 as amended by the Housing Act of 1959 and prohibit the construction of additional transient housing in urban renewal areas until a competent and independent analysis of the local supply of transient housing located in Pittsburgh is made and a determination rendered that there exists a need for said housing.

27. Defendant has failed to exercise his duties and responsibilities in the full and equal exercise of his office in administration of the provisions of the Housing Act of 1949 as amended by the Housing Act of 1959 and has permitted and granted approval to a disposition contract between The Urban Redevelopment Authority of Pittsburgh and Golden Triangle Motor Hotel, Inc. which does not comply with the purpose and character of the Housing Act of 1949 as amended by the Housing Act of 1959 and which is not in compliance with written regulations and procedures adopted and promulgated by the HHFA and applicable to said projects.

28. Plaintiffs have no adequate remedy at law for the irreparable harm and damage caused by the continued neglect, failure and refusal of the defendant to enforce free, equally and without discrimination the HHFA regulations and procedures and the Housing Act of 1949 and the Housing Act of 1959 requiring a survey and a determination of need before permitting additional transient construction in this area.

29. Irreparable harm, damage and injury will follow and be done to plaintiffs unless the continued neglect, refusal and failure of defendant to enforce the Housing Act of 1949 as amended by the Housing Act of 1959 and the applicable regulations and procedures formally adopted by the HHFA are enjoined.

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WHEREFORE, plaintiffs request this Honorable Court to order and direct defendant as follows:

1. To withdraw HHFA approval of the disposition contract until a competent independent analysis of the local supply of transient housing in Pittsburgh, Pennsylvania is conducted and a determination that there is a need for additional units is made.

2. To refrain from continuing to neglect to enforce the provisions of the Housing Act of 1949 as amended by the Housing Act of 1959 requiring a competent independent analysis of the local supply of transient housing in Pittsburgh, Pennsylvania before approving construction of additional units of transient housing in the project area.

3. To freely and equally administer the HHFA approval of plans for additional units of transient housing in Pittsburgh, Pennsylvania in compliance with the adopted and public regulations and procedures of the HHFA.

4. To grant such other relief as may be fair and equitable.

And they will ever pray.

/s/ MALCOLM ANDERSON
Malcolm Anderson

/s/ DONALD C. BUSH
Donald C. Bush
Counsel for Plaintiffs
1707 Oliver Building
Pittsburgh 22, Pennsylvania

/s/ GUY L. QUALLS
Guy L. Qualls
Counsel for Plaintiffs
Suite 513, Perpetual Building
Washington 4, D. C.

Dated: February 5, 1963

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Motion to Dismiss

Motion to Dismiss

Defendant through his attorney, the United States Attorney for the District of Columbia, respectfully moves the Court to dismiss the complaint herein for lack of jurisdiction over the subject matter in that plaintiffs lack standing to sue and for the additional reason that the Court in the exercise of sound discretion should not entertain this action in the absence of persons who ought to be and have not been made parties.

/s/ DAVID C. ACHESON
David C. Acheson
United States Attorney

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Transcript of Hearing

Washington, D. C.,
Tuesday, April 23, 1963

2 **Transcript of Proceedings**

The Clerk: Number 3, Hilton Hotels versus Weaver.

Mrs. Park: Your Honor, I am Ellen Lee Park from the United States Attorney's office.

We have before you this morning a rather unique situation. These plaintiffs, who are hotel owners and operators, in effect, are asking this Court to do what they were unable to persuade the Supreme Court to do, namely, to reverse a Third Circuit decision.

The Court: Pittsburgh Hotels?

Mrs. Park: Yes, it was, and it was denied in February of this year, Your Honor.

The Court: Let's hear from the plaintiff in this case.

Mr. Qualls: Your Honor, I am local attorney of record. May I introduce Mr. Bush from Pittsburgh?

The Court: You don't have much respect for your Pittsburgh Circuit decision or for the Supreme Court's denial of the writ in that case, because I read the case this morning, Counsel, and it seems to me it is exactly on all fours with the case here.

Mr. Bush: We have respect for our Circuit.

The Court: Do you contend that there is any difference factually between the issue involved here and what
3 was involved in that?

Mr. Bush: We think this: The defendant, of course, is the Administrator of the Housing and Home Finance Agency. In Pittsburgh we had wished that they would, and had requested that they become a defendant in the case. And at that time they refused to do so. Now, it appears in the brief they say it would be fine if all parties were in one particular court. We would like it that way too.

The Court: Do you see any difference in the factual situation so as to indicate that I am not bound to follow,

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as the trial court, the higher court decision? It would be presumptuous for me to disagree with this holding unless the facts are different, Counsel.

Mr. Bush: What we find in Pittsburgh, in not having the Housing and Home Finance Administrator as a party to the action, we had to attack, and most of the argument and most of the evidence presented, which came up on our motion for summary judgment, was on the irregularity of the project in Pittsburgh.

The Court: Regardless of whether some other things were discussed, this issue was certainly decided as to whether you have standing to sue here. This is the only issue before me this morning.

4 Mr. Bush: We had felt there, as we feel at the present time, that the backing of this statute, the manner in which it was enacted, the history to it, of its protection for the hotels and its specific application to hotels, was the one point in which we wish to express here. We must have standing to sue. We know that.

The Court: But the court held against you.

Mr. Bush: The trial court didn't even express an opinion as to whether or not we had a standing to sue.

The Court: The trial court decided in other cases cited in this case so held, and these other cases, the Connecticut case, the trial court decided it.

Mr. Bush: In the *Gart v. Cole* and in the *Taft Hotel* case, both of those went up on the constitutionality of the statute. In the *Harrison-Halsted* case—

The Court: Did they discuss standing to sue?

Mr. Bush: They discussed standing to sue. That is correct.

The Court: You say the trial court in this case did not discuss standing to sue?

Mr. Bush: That they express no opinion on the contention the 1959 Amendment was passed for the benefit of hotels and since its enactment they have legal standing to

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5 enforce it because, assuming the affirmative to be the case, such standing is only against post 1959 permitting construction of hotels and transient housing.

The Court: The Court of Appeals—

Mr. Bush: The Court of Appeals in its opinion has one sentence, after discussing that, that it wished it could have the Federal Housing Administrator be able to comment on this. It does state that this particular section, in our opinion, does not give plaintiffs a standing to sue.

The Court: It says more than that, Counsel. It states: Nevertheless, plaintiffs maintain that subject (g) of 410, by implication, if not in terms, gives them a standing to sue. On the other hand, defendants argue that we need not consider the effect of that subsection.

And yet the court goes on to discuss this standing to sue issue and definitely decides that there is no standing to sue. Isn't that right?

Mr. Bush: The court does. The Circuit Court does say that this section does not give plaintiffs the standing to sue. And that was against those particular defendants at that particular time.

Now we are faced with a motion to dismiss by the Housing and Home Finance Administrator, who admits by the motion to dismiss that they have not had a survey in that area.

6 The Court: The survey is another issue. That goes to another issue. The standing to sue issue is a separate issue.

Mr. Bush: Standing to sue, what we claim, Your Honor, is really a question of who has the right, when the Housing Administrator fails to enforce this Act, who has the right to come in and blow the whistle on them.

The Court: Let me ask you this question, Mrs. Parks: Assuming that a survey is necessary under the statute, and the survey wasn't made, who would have the right to raise the question?

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Mrs. Parks: Not these plaintiffs, Your Honor.

The Court: Who would?

Mrs. Parks: If a survey were—

The Court: Suppose the statute required a survey and the survey wasn't accomplished, who would have the right to raise the question?

Mrs. Parks: I don't know of any private individuals who would have the right, Your Honor. I think perhaps the higher-ups in the Government itself could, if the officials—

The Court: One governmental agency sue another governmental agency?

Mrs. Parks: No, I think the officials in control—for instance, the Administrator of Housing and Home
7 Finance Agency, if he felt that one of his subordinates was not complying with the law, he would have the right to discipline him or direct him to do something, and of course if he didn't do it, to take the necessary action.

The Court: But suppose if the head of the department himself approved the matter of not making a survey?

Mrs. Parks: If Your Honor please, I don't believe there is any private citizen that would have any right to contest that.

Mr. Bush: That is what we are saying, Your Honor: that we feel we do have this right, when they admit that a survey was necessary and had not been taken. There is nobody else to enforce this, if the very people for which it was enacted cannot come in and state this.

Now, you had mentioned that we were particularly attacking our Third Circuit down here—

The Court: No, I didn't indicate that you were. I facetiously made the remark at the outset whether a trial judge here should not have respect for the Third Circuit.

Mr. Bush: I think that the Court certainly should. We feel that this brings us to this very point that you have requested. If we can't bring this, and we are the ones who are injured, claim injured from this, who is there left to

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8 bring such an action? Who can enforce this provision, which is definitely in there because hotels requested it? Certainly it is a favored provision, for the hotels. They could build a shop or a bank or a gas station or anything else in this Urban Redevelopment Authority and it wouldn't matter one bit. There is no statute prohibiting any of those. In fact they could construct a hotel in it if they would simply take a survey showing there was a need for one. This is what they have continuously refused.

Back in the initial stage it was suggested to the Court the most expeditious thing to do was to take a survey and show there was a need and then build a hotel. We were quite willing that that be done. But it never has been.

The Court: Anything further?

How do you answer this last statement of counsel? The law provides for a survey, and assuming the Authority completely fails to comply with the law and doesn't make a survey?

Mrs. Parks: Well, if Your Honor please, if this were a project which was initiated subsequent to 1959, in other words, subsequent to the enactment of this statute which the courts have found does not apply to these plaintiffs, then in that situation, I think that the hotels would have standing to sue, conceivably, because the statute in that language would give them the authority to— They would be
9 aggrieved within the meaning of that statute and conceivably under the Administrative Procedure Act they would have authority to contest it. But in this situation, where the plan was approved in 1955, four years before this statute was enacted, these plaintiffs, and no one else in their same situation, have any standing to contest this particular provision, Your Honor.

The Court: What is your answer to that?

Mr. Bush: I feel that this standing to sue comes from the Act itself. Now whether or not this is applicable to that particular plan in 1955, I think is very definitely a factual

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Order

question. Rather just assumption, either by the plaintiff or the defendant in this action. This Act was very specific in its terms. I think the Government, in saying we would have a standing to sue now if this was occurring, simply is bringing back the factual question: does this Act apply as of the time. Standing to sue I am very happy to see conceded by the Government if it was after 1959.

Now we are faced with the question, prior to 1959, was this statute applicable. We think it was enacted to stop construction. The Congressional services which reviewed this particular provision in fact talk about that themselves, in saying that this statute was to amend Section 106 of the

10 Housing Act to prohibit hotels and other transient housing from being constructed. Not the fact whether they were in previous plan or not. The intent of Congress was to stop this additional construction. And this is the question that we think we should be given our day in court on: is to decide the applicability of this statute to this plan and to the planned construction, which was never in any manner or way conceived or committed or contracted for prior to the 1959 Act.

The Court: Well, I will take the matter under advisement.

Mr. Bush: Thank you, Your Honor.

(The hearing was then ended.)

Order

The motion of defendant to dismiss this action came on to be heard by the Court on April 23, 1963. After a consideration of the written memoranda and oral arguments of counsel, and for the reasons fully set forth in the case of *Pittsburgh Hotels Ass'n, Inc., v. The Urban Redevelopment Authority of Pittsburgh*, 309 F. 2d 186 (3rd Cir. 1962), a case involving the same facts and legal issues as are present in the instant case, it is by the Court this 24th day of April, 1963,

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Notice of Appeal

ORDERED That the motion of defendant to dismiss on the ground that the court lacks jurisdiction over the subject matter in that plaintiffs lack standing to sue, be and the same is hereby granted.

(Signed) LUTHER W. YOUNGDAHL
Judge

Notice of Appeal

Notice is hereby given that HILTON HOTELS CORPORATION, ALLEGHENY HOTEL CORPORATION, and SHERATON MIDCONTINENT CORPORATION, Plaintiffs above named, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the Order granting Defendant's motion to dismiss the complaint entered in this action on April 24, 1963.

/s/ MILTON V. FREEMAN
Milton V. Freeman

/s/ MELVIN C. GARBOW
Melvin C. Garbow

ARNOLD, FORTAS & PORTER
1229 - 19th Street, N. W.
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Attorneys for Plaintiffs

Dated: June 19, 1963

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

—
No. 17987

HILTON HOTELS CORPORATION, ALLEGHANY HOTEL COR-
PORATION, SHERATON MID-CONTINENT CORPORATION,
APPELLANTS

v.

ROBERT C. WEAVER, ADMINISTRATOR, HOUSING AND HOME
FINANCE AGENCY, APPELLEE

—
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

—
DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
ELLEN LEE PARK,
DAVID EPSTEIN,
Assistant United States Attorneys.

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 14 1963

Nathan J. Paulson
CLERK

QUESTIONS PRESENTED

In the opinion of the appellee the following questions are presented.

(1) Does the 1949 Housing Act confer standing upon any hotel in a city to challenge the disposition of land within an urban renewal project area for the construction of another hotel? Does the 1959 Amendment to the Housing Act, absent any specific language, confer such standing?

(2) Where appellants have previously litigated the same factual situation through the federal courts of another circuit and were later denied a *writ of certiorari* by the United States Supreme Court, does the doctrine of *res judicata* apply and foreclose any further litigation on the identical issue?

(11)

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17987

HILTON HOTELS CORPORATION, ALLEGHANY HOTEL CORPORATION, SHERATON MID-CONTINENT CORPORATION,
APPELLANTS

v.

ROBERT C. WEAVER, ADMINISTRATOR, HOUSING AND HOME
FINANCE AGENCY, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA*

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By complaint filed on February 5, 1963, appellants brought the instant action, requesting mandatory injunction and other equitable relief against appellee. A motion to dismiss the complaint was filed by appellee on March 7, 1963. On April 23, the motion to dismiss was argued and submitted to the District Court who, by order dated April 24, 1963, granted appellee's motion. (J.A. p. A1.) This appeal followed.

Appellants are three corporations, who own and operate hotels in Pittsburgh, Pennsylvania, and seek to halt the construction of a motel in an urban renewal project area in that city. They ask that the court order appellee, who is the Administrator of the Housing and Home Finance Agency (hereafter referred to as HHFA), to withdraw approval of a disposition contract between the Urban Renewal Authority of Pittsburgh (hereafter referred to as Authority) and a group of investors who are to build the motel. Appellants are them-

selves not located within this project area, yet assert that they have standing to challenge the action of appellee in granting approval.¹ (J.A. p. A2-9.)

Appellee, in the District Court, filed a motion to dismiss the complaint, asserting 1) that plaintiffs lack standing to sue and the court therefore had no jurisdiction to determine the case on the merits and 2) that the court in the exercise of sound discretion should not have to entertain this action in the absence of persons who ought to be and have not been made parties. (See J.A. p. A10.)

At the hearing appellants were repeatedly asked by the court "if there is any difference factually between the issues involved here and what was involved" in *Pittsburgh Hotels Association, Inc. v. Urban Redevelopment Authority of Pittsburgh, et al.*, 309 F. 2d 186 (3rd Cir. 1962), *cert. denied*, 372 U.S. 916 (1963) (J.A. p. A 10, 11, 12.)² They indicated no factual distinction.

The District Court, relying on the Third Circuit decision, "a case involving the same facts and legal issues as are present in the instant case," granted appellee's motion to dismiss on the "grounds that plaintiffs lack standing to sue." (J.A. p. A17.)

¹ Appellee's approval of contracts for disposition of land in urban renewal projects is apparently required under the terms of the Loan and Grant Contract entered into between HHFA and the Authority. (J.A. p. A 5, 7.)

² In *Pittsburgh Hotels Association, Inc. v. Urban Redevelopment Authority of Pittsburgh, et al.*, *supra*, the same appellants who are in the instant case, with the exception of one hotel that is not a party to this case, brought a suit against the Authority, the City of Pittsburgh, and the investors who are to construct the hotel. Appellants in that case sought to enjoin the construction of a hotel, which is the subject of the instant case, on a parcel of land in an officially designated redevelopment area in the City of Pittsburgh until the city made an independent survey and on the basis thereof determined that there exists in the area the need for additional hotel rooms. The Court of Appeals for the Third Circuit held that (1) appellants did not have standing to sue these parties under the Housing Act of 1949, either prior to or subsequent to the 1959 amendment and (2) that neither the 1959 amendment nor any other section required a survey where the provisions for a hotel were included in a 1955 urban renewal plan. Housing Act of 1949, 63 Stat. 413, 42 U.S.C.A. Sec. 1411 et seq. Housing Act of 1959 (1959 Amendment), 73 Stat. 674, 42 U.S.C.A. Section 1456(g).

STATUTES INVOLVED

The 1959 Amendment:

Section 410 of the Housing Act of 1959, 73 Stat. 674, 42 U.S.C.A. Section 1456(g), amended the Housing Act of 1949 and particularly Section 106 of the Housing Act of 1949, 63 Stat. 413, 417, 42 U.S.C.A. Section 1456, by adding the following subsection:

"(g) No *provision* permitting the new construction of hotels or other housing for transient use in the redevelopment of any urban renewal area under this title *shall be included in the urban renewal plan* unless the community in which the project is located, under regulations prescribed by the Administrator, has caused to be made a competent independent analysis of the local supply of transient housing and as a result thereof determined that there exists in the area a need for additional units of such housing." [Emphasis supplied.]

SUMMARY OF ARGUMENT

Neither the Housing Act of 1949 nor the 1959 Amendment to the Act give appellants standing to sue. Appellants have previously litigated this identical issue in the same factual context in *Pittsburgh Hotels Association v. Urban Redevelopment Authority of Pittsburgh*, 309 F. 2d 186 (3d Cir. 1962), *cert. denied*, 372 U.S. 916 (1963). The Court of Appeals for the Third Circuit held that appellants did not have standing to sue under the Acts and that the survey of transient housing in the city which appellants seek, was, in any event, not required. The decision in *Pittsburgh Hotels Association* is (1) persuasive authority or in the alternative (2) binding upon this Court under the doctrine of *res judicata*.

ARGUMENT

I. The Trial Court was correct in dismissing appellants' complaint on the grounds that they lacked standing to challenge appellee's action.

Appellants seek to have the court order appellee to withdraw approval of a disposition contract between the Authority and

the investors who are to build a motor hotel in an urban renewal project area in Pittsburgh until a survey is conducted to determine whether additional hotel rooms are needed in the city. The Court of Appeals for the Third Circuit in *Pittsburgh Hotels Association, Inc. v. Urban Redevelopment Authority of Pittsburgh*, 309 F.2d 186 (3d Cir. 1962), cert. denied, 372 U.S. 916 (1963), held that no requirement exists in any of the Housing Acts for such a survey in this factual situation. The District Court, in the instant case, dismissed the complaint against appellee on the grounds that appellants lack standing to sue.³

A. The Housing Act of 1949, 63 Stat. 413, 42 U.S.C.A., Sec. 1441 et seq., did not give appellants standing to sue.

Appellants apparently concede that under the Housing Act of 1949 they would not have standing to sue and challenge the action of appellee in approving the disposition contract between the Authority and the investors (Br. 32). The Courts have consistently held that the rights of private action to

³ The only issue before this court on appeal is appellants standing to sue appellee. The District Court said repeatedly the only issue before him at the hearing was in regard to standing to sue. (J.A. p. A 12, 13.)

Appellants, however, spend a considerable portion of their brief arguing that a survey to determine the need for additional hotel rooms is required under the 1959 Amendment even though the provision for a hotel in this urban renewal area was included in the approved 1955 urban renewal plan (Br. 16-32). If the requirement for a survey in this urban renewal project were involved in a survey in the instant appeal, appellee would urge, for the same considerations as are set forth in the Argument, *infra*, that the Third Circuit decision in *Pittsburgh Hotels Association* is persuasive authority or in the alternative *res judicata* of that issue.

Pittsburgh Hotels Association states, referring to the 1959 Amendment which appellant cites for the requirement that a survey be conducted, at p. 190.

"The subsection does not prevent all future construction of hotels or the housing for transient use unless a survey is made. It simply provides that no provision permitting such construction shall be included in the urban renewal plan unless it is determined that there is a need for such construction after an independent survey of the local supply has been made." [Emphasis supplied by the Court.]

The Court, after considering the legislative history, went on to say that, "In the absence of reliable indicia showing a Congressional intent that the words include past approved ones, the subsection is not to be applied retroactively, that is applied to urban renewal plans containing a provision permitting the construction of a transient housing unit which had been approved before the effective date of the 1959 Act."

challenge administrative decisions of the Administrator of the HHFA were not created under the 1949 Housing Act. To find authority more persuasive than *Pittsburgh Hotels Association, supra*, would be difficult. That case involves the same parties who are appellants in the instant case and the identical fact situation. They seek the same relief before this Court. The Court of Appeals for the Third Circuit stated flatly, at p. 189, "The Housing Act of 1949, as amended prior to the effective date of the Housing Act of 1959 (1959 Amendment), did not give the plaintiffs standing to sue in this action." The Court cited two cases in support of this proposition: *Taft Hotel Corporation v. Housing and Home Finance Agency*, 162 F. Supp. 538 (D.C. Conn. 1958), *aff'd. per curiam*, 262 F. 2d 307 (2d Cir. 1958) and *Gart v. Cole*, 166 F. Supp. 129 (D.C.S.D.N.Y. 1958) *aff'd* 263 F.2d 244 (2d Cir. 1958).

In *Taft Hotel v. HHFA, supra*, the plaintiff corporation was attempting to halt the construction of a three hundred room hotel within an urban renewal project area under the Housing Act of 1949. The Administrative Procedure Act, 5 U.S.C.A. Section 1009(a), was invoked as authority for the suit. The appellate court held that "plaintiff has no cause of action against the (City of New Haven and the individual members of the New Haven Redevelopment Authority, who were joined as defendants) because it has not standing to sue either as a taxpayer or as a person who may sustain economic loss through competition."

In *Gart v. Cole, supra*, the plaintiffs were landowners and tenants living within an urban renewal project area in New York City. Plaintiffs alleged that they faced eviction if the redevelopment plans were carried out, and then asked the court to enjoin further execution of the plan. Aside from raising constitutional objections on the theory that sale of the project land to a private university affiliated with a religious institution was in violation of the First Amendment to the United States Constitution, the plaintiffs attacked the City's sponsorship agreements alleging that the Housing Acts require open bidding on all property sold as a part of an urban renewal project. The court held that Section 10(a) of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. § 1009(a) (hereafter referred to as

APA) did not give plaintiffs' standing to assert a claim. The court stated, "This section (Section 10 of the APA) leans heavily on existing law, since its requirements, that the person seeking review have suffered 'legal wrong' or have been 'adversely affected or aggrieved by such action within the meaning of any relevant statute,' have well-established meanings. See *Kansas City Power and Light Co. v. McKay*, 96 U.S. App. D.C. 273, 225 F. 2d 924, 931-932, *cert. denied* 350 U.S. 884." The provisions of the Housing Act, which the plaintiffs were attacking, "seem designed to protect not the interest of the landowners or tenants in the redevelopment area, but those of the public at large," at p. 250.

A more recent case, decided on November 28, 1962, once again held that parties, who themselves were part of the property taken by an urban renewal project area, did not have standing to sue. In *Harrison-Halstead Community Group, et al. v. Housing and Home Finance Agency, et al.*, 310 F. 2d 99 (7th Cir. 1962), *cert. denied* 83 S. Ct. 1297 (1963), the action was brought against a number of defendants who were the local agencies and boards in Chicago and in Illinois involved in urban renewal. Also, appellee was a defendant in that case. Plaintiffs, property owners and former property owners within the project area, attempted to invoke the APA in order to secure judicial review of the determination as to the disposition of the land. The Appellate Court held (1) the 1949 Housing Act was a subsidy statute and plaintiffs were not parties to the subsidy contract. (2) The fact that Congress did provide certain standards to guide the Administrator (appellee in the instant case) did "not confer legal rights upon plaintiffs, as individuals, separate from their position as members of the general public." (3) The Housing Act of 1949 contains no provision for judicial review. The court said that having an act which does not provide for judicial review is not unusual and cited *Lar Daly v. Columbia Broadcasting System*, 309 F. 2d 83 (7th Cir. 1962), which dealt with an interpretation of the Federal Communications Act of 1934, has no provisions for judicial review, and bars the bringing of a private cause of action to recover damages in violation of that Act.

As for the APA being applicable, the court said at p. 104, "Plaintiffs in effect argue that Section 10 (a) and (c) confers standing upon anyone who suffers economic injury as a result of agency action regardless of whether that person's private legal rights are violated. We do not think that this is a permissible interpretation." The opinion adds at p. 105, "Courts have consistently denied the standing of citizens to challenge the choice made by public authorities between different and competing public uses."

This Court of Appeals reached an identical conclusion in *Allied-City Wide, Inc. v. Cole*, 97 U.S. App. D.C. 277, 230 F. 2d 827 (1956). There appellants complained that agreements between the Administrator of the HHFA and New York City would result in eviction of appellants, without compensation, from the leased premises in which they carry on businesses. In affirming the District Court dismissal of the complaint, the court stated, "One who will be injured by another's lawful use of money has no standing to assert that a third person's action in providing the money will be illegal." citing *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938).

The weight of authority is overwhelming; the decision of the Third Circuit is dispositive. Appellants do not have standing to challenge the action of the Administrator in his approval of the disposition contract between the Authority and investors either under the 1949 Housing Act or the APA. Indeed, in the case cited above, plaintiffs were usually parties who were initially within the urban renewal project area in issue; thus, the plaintiffs had a more direct involvement in the Administrator's determinations. Here, appellants are hotels doing business within the same city. Their interest and involvement is considerably more attenuated.

B. The 1959 amendment (Housing Act of 1959, 73 Stat. 674, 42 U.S.C.A. section 1456(g) (Supp. IV 1963)) does not give appellants standing to sue.

Appellants contend, throughout the major portion of their brief, that the 1959 Amendment is applicable in the instant situation and that it gives them standing to ask the court to order appellee to withdraw his approval of the disposition contract. The Third Circuit, in *Pittsburgh Hotels Association*, at p. 190, addressed itself to precisely the same question and held

that the 1959 Amendment does not "give (appellants) standing to sue in the action here involved." Appellants apparently recognize the significance of that decision; therefore, they can only urge that this Court overrule, as to appellants, the Third Circuit opinion as being in error. (Br. 11, 16, 17.) In effect they "appeal" the decision of *Pittsburgh Hotels Association, Inc. v. Urban Redevelopment Authority of Pittsburgh, et al.*, from the Third Circuit Court of Appeals to this Court of Appeals. Indeed, appellants suggest that the Third Circuit Court was not fully informed as to the legislative history, absence of which caused an erroneous decision (Br. 20.) The appropriate procedure for appellants to pursue, rather than to appeal their case from that circuit to this one, is to file a motion for recall of the mandate and request a rehearing *en banc* time having expired. The Third Circuit would then have an opportunity to rectify the error which appellants allege was committed in the decision.

Appellee advances two grounds as to the significance of the Third Circuit decision. First, it is persuasive authority in that it dealt with the same issues as are before this Court. Second, appellants are bound by the doctrine of *res judicata*.

1. *Pittsburgh Hotels Association* is persuasive authority.

Pittsburgh Hotels Association, in ruling on the standing of appellants to challenge a disposition contract between the Authority and investors who are to construct a hotel, held that the 1959 Amendment, if it were applicable in requiring a survey of existing hotel space (the Court, however, said the survey was not required), did not confer such a standing upon appellants to challenge the absence of a survey. The opinion is supported by the judicial decisions concerning the 1949 Housing Act, as discussed *supra*; the clear language of the statute in not providing for standing to sue to a special class, i.e., other hotels which are located within the same city though not even in the same urban renewal project area; and the relevant legislative history, as cited in the opinion at fn. 6, 7.

Cases interpreting the 1949 Housing Act have consistently held that even those persons living directly within an urban

renewal project area and about to be dislocated do not have standing to challenge the municipal urban renewal authority or the Administrator of the HHFA. *Allied-City Wide, Inc. v. Cole*, 97 U.S. App. D.C. 277, 230 F.2d 827 (1956). Nor does invoking the Administrative Procedure Act result in a different conclusion. The courts have stated that "economic loss stemming from lawful competition, even though made possible by federal aid, is *damnum absque injuria*." *Taft Hotel v. HHFA*, *supra*. *Alabama Power Co. v. Ickes*, 302 U.S. 464, 478 (1938). The 1959 Amendment does not manifest a Congressional purpose to protect hotels or to create any right in their favor. Such a radical departure in the procedure for urban renewal would surely have had clear language to support it, for none of the other provisions of the 1949 Housing Act are interpreted to provide especial protection to any particular class or to allow them to bring law suits.

Indeed, Congress when it wishes to provide such special standing or protection is careful to make the authorization particularly clear. In 1954 Congress was concerned with a program to provide housing for veterans of the Second World War, and Congress expressly authorized hotel owners to seek injunctions against the unlawful use for transient purposes of housing built with the aid of federally insured mortgages. The statutory provision by which Congress gave hotels such right to seek injunctions is as follows:

"(i) Any person owning or operating a hotel within a radius of fifty miles of a place where a violation of any provision of this section has occurred or is about to occur, or any group or association of hotel owners or operators within said fifty mile radius, at his or their sole charge or cost, may petition any district court of the United States or the district court of any Territory or other place subject to United States jurisdiction within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation of this section shall be found, for an order enjoining such acts or practices, and, upon a showing that such acts or practices constituting such violation have been engaged in or are about to be engaged in, a

permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted."

12 U.S.C. Section 1731b(i), 12 U.S.C.A. Section 1731b(i), referring to Section 1731b which generally prohibits the use for transient purposes of housing built with the aid of federally insured mortgages.

Had Congress felt any need to enlist the aid of hotels in connection with the 1959 Amendment, Congress would have spelled out a right of action in hotel owners as it did in connection with the veterans housing program. That no such right of action was spelled out is strong proof that such a right was not intended to accrue to hotels.

2. Pittsburgh Hotels Association is Res Judicata in the instant case.

Appellants have taken the identical case once through the District Court for the Western District of Pennsylvania, 202 F. Supp. 486; through the Court of Appeals for the Third Circuit; and to the Supreme Court, where the petition for writ of certiorari was denied, 372 U.S. 916 (1963). Dissatisfied with their days in court, appellants seek to enjoin appellee from fulfilling the terms of the Loan and Grant Contract with the Authority until a survey is conducted, a survey which the Third Circuit concluded was unnecessary. The doctrine of *res judicata* is applicable, for the policy considerations are present which call for an end to litigation rather than continuous harassment and delay. The original action was brought in July, 1961. A number of hearings were held in the District Court for the Western District of Pennsylvania and the order for summary judgment in favor of the defendants was entered on February 14, 1962. Argument before the Third Circuit was on June 22, 1962, and the case was decided on October 22, 1962. One year has elapsed, one more year of delay in the completion of this phase of the urban renewal project, and the case is now before this Court. Appellants are forum shopping and seeking to relitigate what is already decided.

Appellants were the identical moving parties in the Third Circuit case; the issues resolved, were, as stated above, identical in every major respect. Appellee, though a different party

than the defendants in Third Circuit case, raised that determination as *res judicata*. (J.A. p. A11.)

The doctrine of *Bernhard v. Bank of America*, 122 P. 2d 892 (Sup. Ct. of Calif. 1942) sets forth the doctrine of *res judicata* that has found wide acceptance in the federal system. Justice Traynor, speaking for a unanimous Supreme Court of California, stated at p. 894,

"The criteria for determining who may assert a plea of *res judicata* differ fundamentally from the criteria for determining against whom a plea of *res judicata* may be asserted. The requirements of due process of law forbid the assertion of a plea of *res judicata* against a party unless he was bound by the earlier litigation in which the matter was decided. [Citations omitted.] He is bound by the litigation only if he has been a party thereto or in privity with a party thereto. There is no compelling reasons, however, for requiring that the party asserting the plea of *res judicata* must have been a party, or in privity with a party, to the earlier litigation."

Justice Traynor went on to say that the validity of a plea of *res judicata* are established through the following criteria, at p. 895,

"Was the issue decided in the prior adjudication identical with one presented in the action in question.

"Was there a final judgment on the merits.

"Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication."

The answers to the above, in the instant case, are all in affirmative. The opinion added that where a party, though appearing in two suits in different capacities is in fact litigating the same right, the judgment in one estops him in the other.

The Third Circuit cites *Bernhard, supra*, with approval and says in *Bruszewski v. United States*, 181 F. 2d 419, at p. 422 (3d Cir. 1950),

"But where, as in this case, *res judicata* is invoked against a plaintiff who has twice asserted essentially the same claim against different defendants, courts

have, * * *, enlarged the area of *res judicata* beyond any definable categories of privity between the defendants." (See cases cited at p. 421 and in footnotes 4, 5 and 6.)

See, *United States v. Willard Tablet Co.*, 141 F.2d 141 (7th Cir. 1944); *United Banana Co. v. United Fruit Co.*, 172 F. Supp. 580 (D.C. D. Conn. 1959); compare *Good Health Dairy Products Corp. v. Emery*, 275 N.Y. 14, 9 N.E. 2d 758 (Ct. App. 1937) with *Elder v. New York and Pennsylvania Motor Express, Inc.*, 284 N.Y. 350, 31 N.E. 2d 188 (Ct. App. 1940).

Appellee has since the inception of the instant case, through the pleadings, memorandum to dismiss, and in the hearing, urged that the previous litigation was controlling and dispositive. Application of the doctrine of *res judicata* is appropriate. See, *Duke v. Durfee*, 308 F.2d 209 (8th Cir. 1962), *cert. granted*, 371 U.S. 946 (1963); *Carpenter v. Erie R. Co.*, 178 F.2d 921 (2d Cir. 1949), *cert. denied*, 339 U.S. 912 (1950); *Ross v. Ickes*, 76 App. D.C. 147, 130 F.2d 415 (1942).

In *Gart v. Cole*, *supra*, the court held, in a situation identical with the instant appeal, that the litigation between the plaintiffs and the municipal authorities in the New York State courts was *res judicata* in an action by the same plaintiffs, or persons in privity with them, against the Administrator of the HHFA. The court stated,

"And as a practical matter, the relief appellants seek in this action against FHHFA (HHFA) will curtail the progress of the Lincoln Square Urban Renewal Project as effectively as the direct injunctive relief against the active Project participants unsuccessfully sought in the New York courts."

The court went on to say that the issue was once litigated to a final judgment, and, inasmuch as a New York state court would not allow relitigation, neither should a federal court.

The District Court, in the instant case, characterized *Pittsburgh Hotels Association* as "exactly on all fours with the case here." The complaint was ordered dismissed "for the reasons fully set forth" in the Third Circuit opinion. The determination of standing, having been previously litigated, is binding on this Court under the doctrine of *res judicata*.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

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APPELLANTS' REPLY BRIEF

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,987

HILTON HOTELS CORPORATION, ALLEGHENY HOTEL CORPORATION,
SHERATON MID-CONTINENT CORPORATION,
Appellants,

v.

ROBERT C. WEAVER, Administrator of the Housing & Home
Finance Agency, *Appellee.*

On Appeal from the United States District Court for the
District of Columbia

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United States Court of Appeals
for the District of Columbia Circuit

Dated: October 19, 1963

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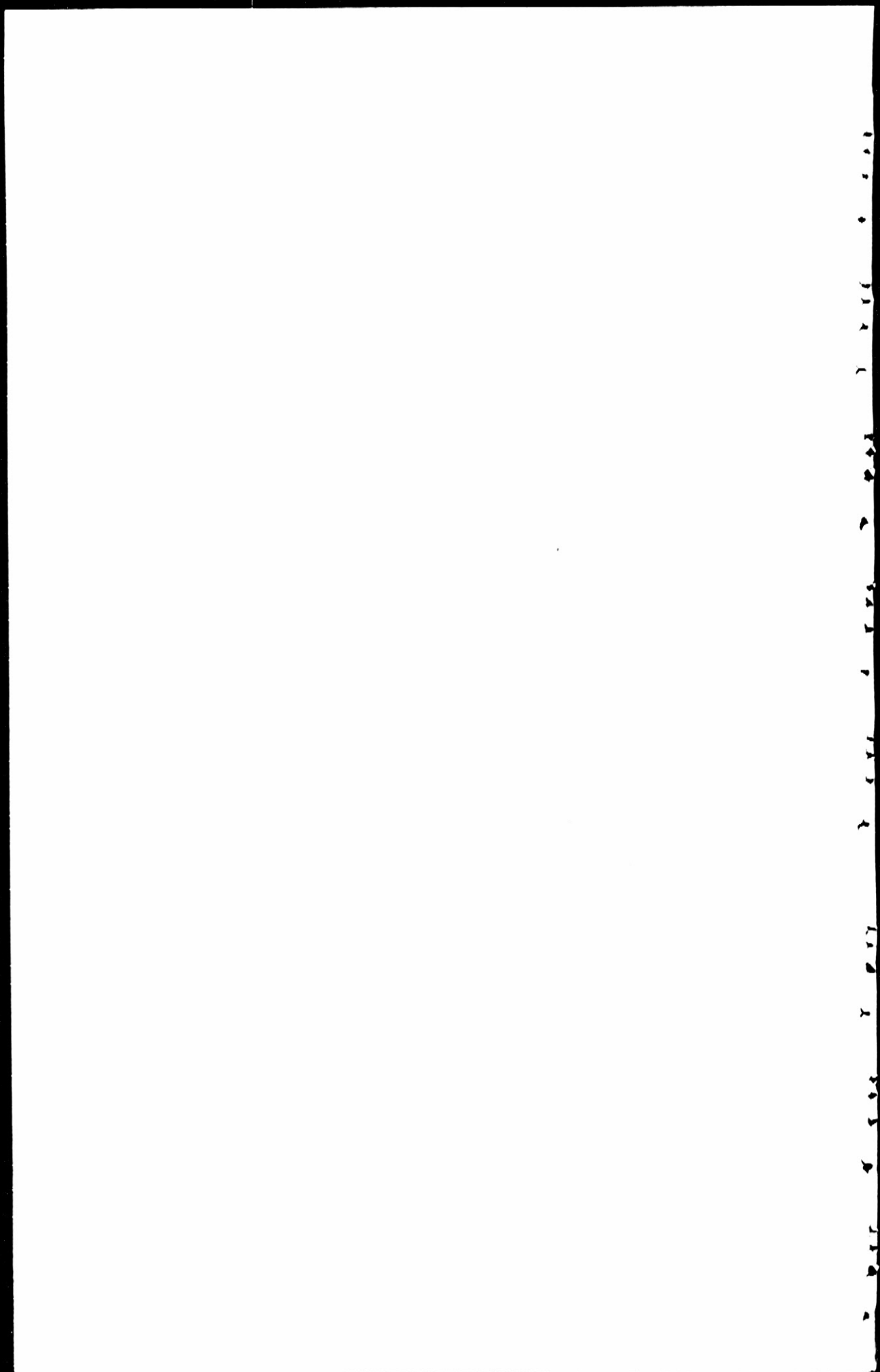


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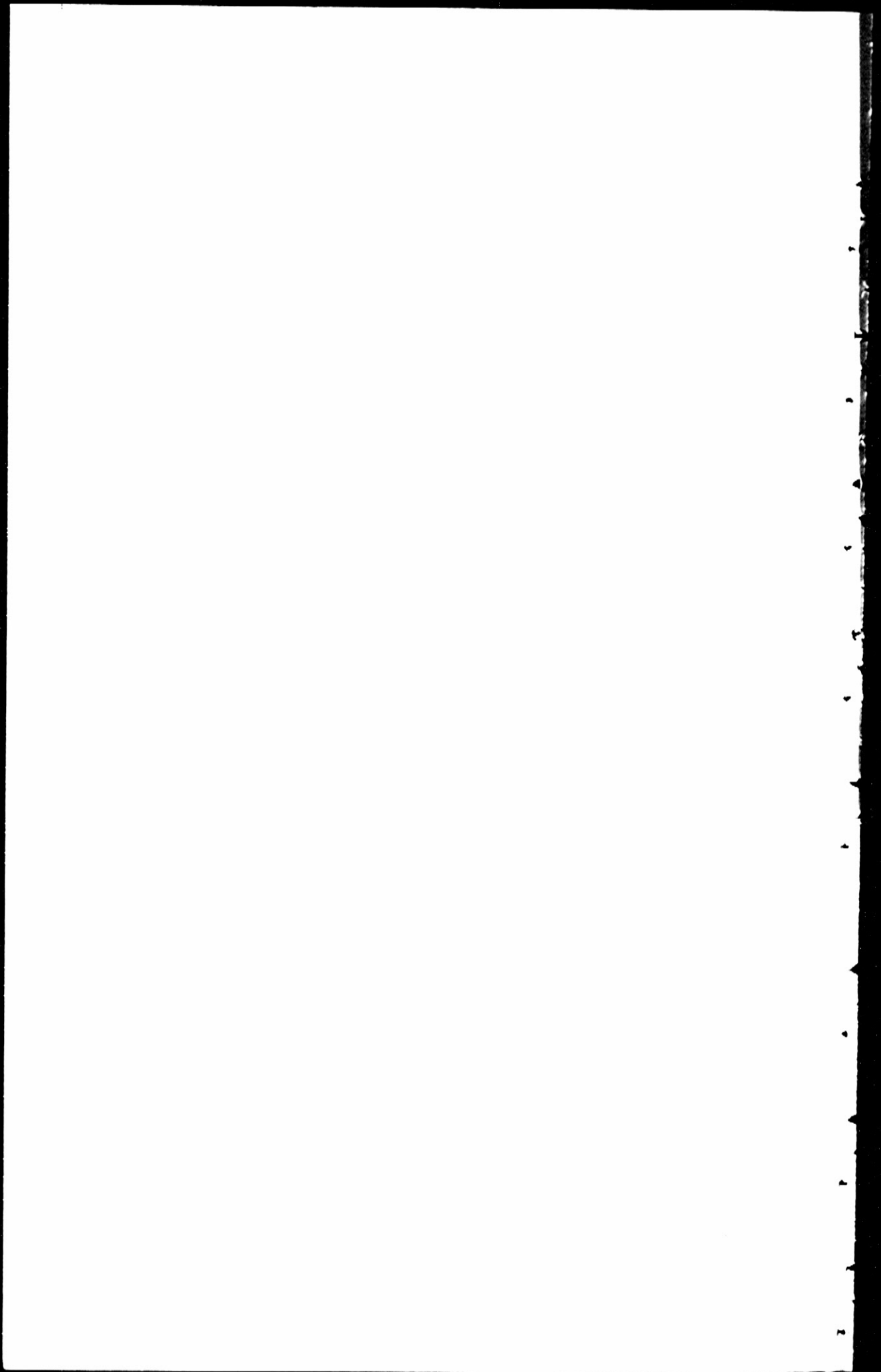
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IN THE
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Appellants,

v.

ROBERT C. WEAVER, Administrator of the Housing & Home Finance Agency, *Appellee.*

On Appeal from the United States District Court for the District of Columbia

APPELLANTS' REPLY BRIEF

ARGUMENT

I.

It Is Uncontroverted that Congress Enacted the Survey Procedure of § 106(g) of the Housing Act to Protect Appellants by Prohibiting the Construction of Unneeded Hotels in Federally Subsidized Urban Renewal Areas

Appellants in their main brief (pp. 23-29) set out the entire legislative history of § 106(g) of the Housing Act which demonstrates with great clarity that Congress enacted the simple survey procedure of § 106(g) as a means

of prohibiting the construction of unneeded hotels in federally subsidized urban renewal areas. Appellee does not challenge that contention. Indeed, Congress' intent is so clearly manifested by the legislative history that it cannot be contradicted. Moreover, no construction has yet begun on the proposed Pittsburgh hotel, and appellee implicitly concedes that if the mandate of Congress is to be discharged, the survey requirements of § 106(g) should be applied in the instant case. Appellee does not controvert the merit of this contention. Rather, appellee's opposition is based solely on the technical legal doctrine of standing and on the prior decision of the Third Circuit.

For reasons fully described in appellants' main brief (pp. 20-21, 29-30) we believe that the decision of the Third Circuit was erroneous. It produced a result entirely contrary to the intent of Congress, as appellee now implicitly concedes, and should not be followed.

Appellee's contentions on the technical issues of standing and res judicata are discussed hereafter.

II.

Appellants' Standing To Sue Is Derived from § 106(g) of the Housing Act of 1949 Wherein Congress Sought To Protect Appellants from the Form of Unfair Competition Now Confronting Them

Appellee's argument on the issue of standing to sue demonstrates a complete misapprehension of appellants' position. Appellee ignores the fact that Congress inserted the survey procedure of § 106(g) into the Housing Act specifically to protect *hotels*. Appellants do not claim that the many provisions of the Housing Act grant standing to all persons who may be affected by the various urban renewal projects. Nor do they claim that the substantive provisions of the Housing Act were passed for the benefit of hotels. But it is claimed, and appellee does not deny it, that Congress created the survey procedure of

§ 106(g) solely for the benefit of existing hotels—to protect hotels from the unfair competition caused by the subsidized construction of surplus hotels where they are not needed. It is from § 106(g) that appellants' standing is derived.

The very distinction which appellants' now urge was recently acknowledged by appellee in a brief to the Supreme Court where appellee noted the difference between violations of Housing Act provisions "included for the benefit of the government, or the public at large" and violations of provisions, such as § 106(g), "plainly intended for the protection of a distinct class of which the complainants are members." (Brief for the Respondents HHFA and Robert C. Weaver in Opposition to Petition for Certiorari, pp. 8-9, *Harrison-Halsted Community Group, Inc. v. HHFA*, No. 861, October Term, 1962, 373 U.S. 914 (1963)). Moreover, the complaint now before this court alleges obvious procedural violations and does not require the court to review the merits of administrative decisions. Appellee admitted to the Supreme Court that this is the very form of complaint which presents

"an order of claim *peculiarly appropriate for judicial consideration* and one which may be cognizable even where the merits of the administrative action is not open to judicial review. See e.g., *Service v. Dulles*, 354 U.S. 363, 373; *Vitarelli v. Seaton*, 359 U.S. 535, 540." (HHFA Brief in Opposition to Petition for Certiorari, *supra*, at p. 12).

Thus, according to appellee's own classification, appellants appear before this court in the best possible position, for they are complaining about admitted *procedural* violations of a section of the Housing Act "plainly intended for the protection of a distinct class of which complainants are members."

Appellee fails to meet these contentions and its citations are wholly inapposite. *Gart v. Cole*, 263 F.2d 244 (2d Cir.

1959), relied on by appellee, in fact fully supports appellants' claim to standing. The Second Circuit held in the *Gart* case that the appellants there, property owners and business tenants in a redevelopment area, "*do have standing* in this action to challenge the Administrator's refusal to grant them an oral hearing on the feasibility of the relocation plan," (263 F. 2d at 250) it appearing to the court that the hearing procedure of the act was "in protection of the interests of displaced residents such as appellants." (263 F. 2d at 251). *Taft Hotel Corp. v. HHFA*, 262 F. 2d 307 (2d Cir. 1958) was decided prior to the amendment of the act here in issue.¹ *Allied-City Wide, Inc. v. Cole*, 97 App. D.C. 277, 230 F. 2d 827 (1956) did not involve hotels or rights personal to the plaintiffs and was also decided prior to the enactment of § 106(g).² None of these cases meets appellants' contention that their right to maintain this suit is derived directly from § 106(g) of the act, a section specifically enacted by Congress to give protection to hotels under the circumstances now presented to the court.

The only case which has considered the effect of § 106(g) is *Pittsburgh Hotels Association, Inc. v. Urban Redevelopment Authority of Pittsburgh*, 309 F. 2d 186 (3d Cir. 1962), *cert. denied*, 372 U.S. 916 (1963), and for reasons set out in detail in our main brief (pp. 20-30, 32-36) we believe the Third Circuit reached an incorrect result, in derogation of the intent of Congress, and contrary to the

¹ The *Taft* case was decided on December 31, 1958. The following May the Chairman of the House Subcommittee on Housing introduced § 106(g) in an obvious attempt to correct legislatively the result reached in the *Taft* case. See Appellants' Brief, pp. 24-25.

² *Harrison-Halsted Community Group v. HHFA*, 310 F. 2d 99 (7th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963) similarly did not deal with hotels or with procedural matters but rather concerned the "merits of the relocation plan and its compliance with the substantive standards announced in the statute and the HHFA Manual." (Emphasis in original. HHFA Brief in Opposition to Petition for Certiorari, *supra*, at p. 13).

teaching of cases in the Second Circuit and this Circuit. Indeed, it is the very absence of other judicial precedents under § 106(g) that increases the urgency of appellants' plea, lest a manifestly incorrect decision remain as the sole benchmark in the area, and frustrate the clear intention of the Congress.

The recent decisions of this court clearly establish appellants' standing to sue. In *Whitney National Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.*, (No. 17,672) and *Saxon v. Bank of New Orleans & Trust Co.*, (No. 17,681) both decided August 14, 1963, this court held that parties protected by a statute from a certain form of competition have standing to challenge federal administrative action, where it is alleged that such action is unlawful and will create that specific form of competition prohibited by the statute. This is precisely the nature of appellants' claim herein. The test is whether the competition is sanctioned by Congress. If it is not, as here, then those who will suffer substantial and irreparable injury as a result of such competition have standing to sue to enjoin it. See the *Bank of New Orleans & Trust Co.* cases, *supra*, slip opinion, p. 15, n. 9, and see *Fleming v. Moberly Milk Products Co.*, 82 App. D.C. 16 at 21, 160 F. 2d 259 at 264 (D.C. Cir. 1947).

As set forth in our main brief (pp. 32-35) appellants are members of the class for whose especial benefit Congress passed § 106(g); and appellee's unlawful action threatens them with irreparable injury from the kind of competition which Congress, through § 106(g), sought to prohibit. On these facts, appellants' standing is undeniable.³

³ Appellee makes repeated mention of the fact that appellants' hotels are not located *within* the proposed urban renewal project and suggests that this fact adversely affects appellants' standing to sue. It is claimed that because appellants' hotel locations are not within the boundaries of the urban renewal project "their interest and involvement is considerably more attenuated." (Appellee's Brief, p. 7). There is absolutely nothing to support such a contention. Appellants' interest could not be more direct; it is the interest of

III.

Express Grants of Authority to Hotels To Sue to Enjoin Violations of Other Housing Acts Are Evidence that Congress Intended that Hotels Should Have a Right To Participate in the Enforcement of Statutes Passed for the Benefit of Hotels

As indicated in our main brief the National Housing Act contains typical expressions of Congress' longstanding intent that federal housing funds are to be used mainly for the construction of permanent residential housing, not hotels, 68 Stat. 580, 610 (1954), 12 U.S.C. § 1731b; Appellants' Brief p. 22. But appellee notes that under various provisions of that act hotels within fifty miles of a place where a violation of the act has occurred are *expressly* given the right to petition a United States District Court for injunctive relief. Appellee argues that in the absence of such an express grant of authority appellants here must be held to lack standing.⁴

those seeking to protect their business from the ravages of unlawful, subsidized competition.

Appellants' hotels are located in the central business district of the city of Pittsburgh, immediately adjacent to the urban renewal area where it is proposed to construct a competing hotel. Appellee has admitted for present purposes that as a result of the unlawful construction of this nearby competing hotel appellants' business and property will be "injured and damaged irreparably by the loss of customers," as alleged in the complaint. (J.A. p. A7) Appellants' standing does not derive from their location in one city block or another, but from the fact that they will be injured by the kind of competition from which Congress sought to protect them, when it imposed the survey requirements of § 106(g). It is the "local supply" of hotels, encompassing the entire market area including appellants, that is the concern of the statute, and it is the admitted superabundance of this supply which is the cause of appellants' concern. (J.A. p. A7)

⁴ The maxim of *expressio unius est exclusio alterius* has of course been rejected by the Supreme Court as a rule of law. *Neuberger v. Comm. of Internal Revenue*, 311 U.S. 83, 88 (1940); *S.E.C. v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943). Courts will not slavishly follow a maxim, but

"... will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." (*S.E.C. v. C. M. Joiner Leasing Corp.*, 320 U.S. at 350-51)

The answer is twofold. First, under the National Housing Act, Congress intended the express grant of standing to hotels fifty miles from a violation to be in addition to remedies available to hotels closer and in competition with the unlawful operation. The express grant did not derogate from those rights of standing which would normally be implied from the statute under the usual rules of statutory interpretation. The fifty-mile standard simply obviated difficult problems of proving competitive injury. Sen. Rep. No. 1472 on the Housing Act of 1954, 83d Cong., 2d Sess. 33 (1954), 2 U.S. Code Cong. & Ad. News 2723 at 2755 (1954).

Second, express grants of standing to private persons to enforce federal regulatory statutes have not precluded the implication of these rights in other closely related statutes. To the contrary, courts have accepted express grants of standing in parts of a remedial legislative plan as evidence of Congress' intent to protect specifically the groups granted standing. When it appeared that those petitioning for judicial relief under a related statute were within the group Congress sought to protect, and where it appeared that the acts complained of were the very practices Congress sought to remedy, courts have been quick to imply standing and liberal in granting relief.

The most familiar examples probably occur among the laws administered by the Securities and Exchange Commission. The Securities Act of 1933, 15 U.S.C. §§ 77a-77aa, the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78hh, the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79-79z and the Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa-77bbbb each contain express authority for private civil actions. See 15 U.S.C. §§ 77k, 77l, 78i(e), 78r, 79p, and 77www. The Investment Company Act of 1940, 15 U.S.C. §§ 80a-1-80a-52, does not contain such authority. But this has not prevented the courts from implying authority for private civil actions under the Investment Com-

pany Act, when it appeared that those petitioning the courts for relief were those for whose protection Congress passed the Investment Company Act. See e.g. *Brown v. Bullock*, 194 F. Supp. 207 (S.D.N.Y.), *aff'd*, 294 F. 2d 415 (2d Cir. 1961); *Taussig v. Wellington Fund, Inc.*, 187 F. Supp. 179 (D.Del. 1960), *aff'd*, 313 F. 2d 472 (3d Cir. 1963).

Without question appellants are members of the class for whose protection Congress imposed both the restrictions on the use of FHA mortgage funds for apartments leased on a transient basis, (12 U.S.C. § 1731b) and the restrictions on the construction of hotels in urban renewal areas. Such remedial provisions as here evidenced should be liberally construed so as to further Congress' overall intent—demonstrated by the various housing acts—of protecting hotels from different forms of unfair competition. Appellants' standing should not be denied.

IV.

Appellee Is Not Entitled To Set Up the Plea of Res Judicata Because He Was Not a Party, Nor in Privity with a Party, in the Former Third Circuit Litigation

Appellee was fully apprised of the former litigation in the Third Circuit and, while not subject to service of process therein, was requested to join voluntarily. Appellee made no such appearance. Neither appellee, nor any representative for him, was a party in that suit. Until now, appellee has insisted on the right to have its liability adjudicated only in this jurisdiction.⁵ Had the Third Circuit decision been in favor of appellants it is inconceivable that appellee would now agree to be bound by that decision. Yet appellee presently seeks to prohibit any adjudication

⁵ Appellee now advises that "the appropriate procedure for appellants to pursue" is back in the Third Circuit (Appellee's Brief, p. 8). But appellee does not suggest that he would be any more willing to appear and be bound there now than formerly.

of his own misconduct by relying on that same judgment and by raising the plea of res judicata. Such hide-and-seek tactics should not be sanctioned by the court.

The issues in the two cases are not the same and for this reason res judicata is inapplicable. In the Third Circuit appellants and others sought to prohibit the unlawful construction of a hotel by city officials and private parties. In the instant case appellants seek to enjoin the appellee's unlawful approval of a land disposition contract until the survey requirements of § 106(g) are discharged.

More important, however, the settled precedents of this court and the Supreme Court clearly establish that res judicata is inapplicable precisely because appellee was *not* a party in the former litigation. It is black letter law that "*identity of parties, subject matter and issues are essential elements of res judicata,*" (3 Barron & Holtzoff, Federal Practice and Procedure § 1192 (1958)) or as the Restatement of Judgments puts it:

"§ 93. General Rule . . . [A] person who is not a party or privy to a party to an action in which a valid judgment other than a judgment in rem is rendered . . . (b) *is not bound by or entitled to claim the benefits of an adjudication upon any matter decided in the action.*"

The Supreme Court has repeatedly affirmed the long standing Restatement rule, considering it to be "a principle of general elementary law" that one not bound by a prior judgment may not use it to estop a claim. *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111 at 127 (1912); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955); *United States v. Pink*, 315 U.S. 203 (1942); *Keokuk & W. R. Co. v. Missouri*, 152 U.S. 301 (1894).

The question is not new in this jurisdiction. A year ago, in *General Heating Engineering Co. v. District of*

Columbia, 112 App. D.C. 225, 301 F. 2d 549 (D.C. Cir. 1962), this Court rejected the argument now made by appellee, ratifying the traditional rule of the Restatement and holding that one who is a complete stranger to a prior judgment may not use it to bar a subsequent claim.⁶

But appellee, relying primarily on the California case of *Bernhard v. Bank of America National Trust & Savings Ass'n.*, 122 P. 2d 892 (Sup. Ct. Cal. 1942), urges this court to depart from these settled precedents and adopt a novel rule, which would relieve the appellee of the obligation of defending his actions even once. Contrary to appellee's extravagant claims for the case, *Bernhard* has found minimal approval in but a handful of states. Even in California the actual holding in *Bernhard*—as distinct from the broad language used—has now been explained in such a way as to harmonize it with the preponderant majority of jurisdictions which adhere to the rule of the Restatement. See *Miller's Estate*, 230 P. 2d 667, 677-78 (Dist. Ct. App. Cal. 1951).⁷ But whatever the scope of the decision might

⁶ In *General Heating Engineering Co. v. District of Columbia*, a party sued the District of Columbia and an independent contractor for damages allegedly caused by the negligent repair of a road. There was a directed verdict in favor of the contractor and a jury finding of negligence against the District of Columbia. After paying the judgment, the District of Columbia sued the contractor for indemnification under a contract between them. The contractor claimed he was not liable to indemnify the District of Columbia for its own negligence, and that such negligence had been conclusively established in the former suit. This court held that the District of Columbia was not barred by res judicata from relitigating the issue of its negligence, and that the District of Columbia was in fact not negligent.

⁷ In *Bernhard*, in a suit brought by the beneficiary of an estate, the executor of the estate was held not to be liable to the estate for payment of estate funds to himself. In a subsequent suit by the beneficiary against the bank which had actually made the payment to the executor, the bank was permitted to use the prior judgment to establish conclusively that the payment to the executor had been lawful, it appearing that if the bank were liable to the beneficiary, the executor was liable to indemnify the bank. Far from establishing a new doctrine the actual holding of the case does no more than follow the general rule which permits one not a party to a prior judgment to obtain the res judicata benefits of the prior judgment if he is *in privity* with one who

be, *Bernhard* has been specifically rejected by this court, *General Heating Engineering Co. v. District of Columbia*, *supra*, and it is not the law in the District of Columbia.⁸

The other case on which appellee principally relies, *Bruszewski v. United States*, 181 F. 2d 419 (3d Cir. 1950), does not even deal with *res judicata*, according to the Supreme Court. *Lawlor v. National Screen Service Corp.*, 349 U.S. at 330 n. 20 (1955).⁹

In sum, appellee suggests that this court depart from its own precedents and the long standing precedents of the Supreme Court to adopt a much criticized and seldom followed minority rule. But as Professor Moore has written in support of the Restatement rule:

"[T]he doctrine of judicial finality is not a catch-penny contrivance to dispose of cases merely for the sake of disposition and clear up dockets in that manner . . . [The traditional doctrine of *res judicata*] promotes substantive justice. It should not be sacrificed on a false altar of judicial economy." (Moore and Currier, "Mutuality and Conclusiveness of Judgments," 35 *Tulane L. Rev.* 301, 308, 330 (1961).

Appellee urges only the public advantage in reducing litigation. Indeed, if this were truly the appellee's object he could have joined the Pittsburgh litigation as he was asked to do. Instead, he has insisted on his right to have

is bound by the prior judgment, the usual examples being masters and servants, principals and agents, and, as in *Bernhard*, indemnitors and indemnitees. See Restatement, Judgments §§ 96-105; and Professor Moore's explanation and criticism of the *Bernhard* decision, Moore and Currier, "Mutuality and Conclusiveness of Judgments," 35 *Tulane L. Rev.* 301 (1961). See also *Hornstein v. Kramer Bros. Freight Lines, Inc.*, 133 F. 2d 143, 145 (3d Cir. 1943).

⁸ In *General Heating Engineering Co. v. District of Columbia*, Judges Bazelon and Edgerton held that one who is a stranger to a judgment may not use it to bar a subsequent claim. See note 6, *supra*. Only Judge Miller, in his dissenting opinion, cited *Bernhard* with approval. 301 F. 2d at 554.

⁹ *Gart v. Cole*, 263 F. 2d 244, 249 (2d Cir. 1959) also cited by appellee for support was decided under a New York procedural rule which is not the law in the District of Columbia or in the vast majority of other jurisdictions. See *General Heating Engineering Co. v. District of Columbia*, *supra*, note 6.

his actions challenged only in this court. This litigation is in direct response to that insistence. Appellee cannot avoid the present challenge by claiming the benefit of a prior suit he deliberately chose to ignore. The public interest in reducing litigation must yield to the superior public interest in fair procedure.

Appellant's right to be heard in court is not to be lightly brushed aside. It is not an abstraction, a right merely to be heard somewhere at some time, but a right to be heard in court on the allegations of the complaint *against the appellee*. See *Hornstein v. Kramer Bros. Freight Lines, Inc.*, 133 F. 2d 143 at 145 (3d Cir. 1943). Appellee's plea of res judicata should be denied.

CONCLUSION

It being admitted that § 106(g) was enacted to protect appellants by prohibiting unneeded hotel construction in federally subsidized urban renewal areas, the precedents of this court and the legal principles relied on by appellants in this brief and their main brief establish beyond question that appellants have standing to challenge appellee's disregard of the requirements of the Housing Act. The District Court erred in dismissing the complaint. Accordingly, the judgment below should be reversed.

Respectfully submitted,

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